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90-968

No. _____

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

STATE OF NORTH CAROLINA,

Petitioner,

v.

LEROY MCNEIL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

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QUESTION PRESENTED

WHETHER CAPITAL SENTENCING INSTRUCTIONS, WHICH DO NOT EXPLICITLY REQUIRE THAT MITIGATING CIRCUMSTANCES BE FOUND BY THE JURY UNANIMOUSLY, VIOLATE *MCKOY V. NORTH CAROLINA*, 494 U.S. ____, 110 S.CT. 1227 (1990) BY CREATING A REASONABLE LIKELIHOOD THAT AN INDIVIDUAL JUROR MIGHT UNDERSTAND HE OR SHE IS PRECLUDED FROM CONSIDERING A MITIGATING CIRCUMSTANCE UNLESS THE FACTOR UNANIMOUSLY IS FOUND BY ALL TWELVE MEMBERS OF THE JURY?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, the State of North Carolina, by and through its undersigned counsel, the Honorable Lacy H. Thornburg, Attorney General of North Carolina and Special Deputy Attorney General Barry S. McNeill, respectfully prays that a writ of certiorari issue to review the judgment of the North Carolina Supreme Court, entered on September 18, 1990, which set aside Respondent Leroy McNeil's two death sentences and remanded his case for a new capital sentencing proceeding.[1]

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1 The parties to this proceeding are the Petitioner, the State of North Carolina (hereinafter referred to as "State"), and Respondent, Leroy McNeil (hereinafter referred to as "McNeil").

OPINION BELOW

This petition seeks review of the published decision by the North Carolina Supreme Court, which is reported at ***State v. McNeil***, 327 N.C. 388, 395 S.E.2d 106 (1990), and which is reproduced in the Appendix at 1-11.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on September 18, 1990.[2] The jurisdiction of this Court to review the North Carolina Supreme Court's decision is invoked pursuant to 28 U.S.C. §1257(3) and Rule 10.1(b) and (c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS

U.S. Const. Amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted;

U.S. Const. Amend. XIV, § 1: [N]or shall any state deprive any person of life, liberty, or property, without due process of law;

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2 The opinion of the North Carolina Supreme Court was filed on August 29, 1990. The actual judgment, however, is entered in the docket by the clerk twenty (20) days after the date of the filing of the opinion. N.C.R.App.P. 32(b) (1990).

N.C.Gen.Stat. §15A-2000(b) (Cum. Supp. 1981)[3]:

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstances or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors.

STATEMENT OF THE CASE

Leroy McNeil was tried and convicted at the April 30, 1984 Criminal Session of Wake County Superior Court of two counts of first-degree murder for the brutal slayings of Deborah Jean Fore and Elizabeth Faye Stallings. The evidence supporting McNeil's convictions and death sentences is summarized at ***State v. McNeil***, 324 N.C. 33, 37-39, 375 S.E.2d 909, 912-13 (1989).

A sentencing hearing thereafter was held pursuant to N.C.Gen.Stat. §15A-2000 (Cum. Supp. 1981), to determine whether McNeil should receive the death penalty for his capital murder convictions. The trial court's sentencing instructions required unanimity as to the jury's findings of aggravating circumstances, the weighing of aggravating and mitigating cir-

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3 North Carolina General Statute §15A-2000 (Cum. Supp. 1981) is reproduced in the Appendix at 12-17.

cumstances found, the determination of whether the aggravating circumstances were sufficiently substantial to warrant imposition of the death penalty, and in reference to the ultimate sentencing recommendation.[4] (App 21-22) However, neither the instructions nor the written "Issues and Recommendation" forms expressly referred to a requirement that the mitigating circumstances must be found by the jury unanimously. (App 27-31, 48-49, 52-53)

The jury found three aggravating circumstances as to the murder of Elizabeth Stallings: McNeil previously had been convicted of a felony involving the use of violence to the person [N.C.Gen.Stat. §15A-2000(e)(3) (Cum. Supp. 1981)]; the murder took place during the commission of robbery with a firearm [N.C.Gen.Stat. §15A-2000(e)(5) (Cum. Supp. 1981)]; and, the murder was especially heinous, atrocious or cruel [N.C.Gen.Stat. §15A-2000(e)(9) (Cum. Supp. 1981)]. (App 44-45, 51-52) As to the murder of Deborah Fore, the trial court submitted and the jury found two aggravating circumstances: McNeil previously had been convicted of a felony involving the use of violence to the person [N.C.Gen.Stat. §15A-2000(e)(3) (Cum. Supp. 1981)]; and, the murder took place during the commission of robbery with a firearm [N.C.Gen.Stat. §15A-2000(e)(5) (Cum. Supp. 1981)]. (App 45-46, 47-48)

In both cases, the trial court submitted for the jury's consideration the following possible mitigating circumstances: McNeil had no significant history of prior criminal activity [N.C.Gen.Stat. §15A-2000(f)(1) (Cum. Supp. 1981)]; McNeil's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired [N.C.Gen.Stat. §15A-2000(f)(6) (Cum. Supp. 1981)]; McNeil confessed to the crimes shortly after the crimes were committed; McNeil has an I.Q. of 78 and is borderline mentally retarded; McNeil had been a good and useful employee of Rea Construc-

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4 The trial court's sentencing instructions to the jury are reproduced in the Appendix at 18-46.

tion Company prior to the events of April 1983; and, any other circumstance or circumstances arising from the evidence which the jury deems to have mitigating value [N.C.Gen.Stat. §15A-2000(f)(9) (Cum. Supp. 1981)]. (App 27-31)

The jury responded "yes" to Issue Two on the "Issues and Recommendation" sheets: "Do you find from the evidence the existence of one or more of the following mitigating circumstances?", but was not instructed to and did not specify which of the mitigating circumstances it found. (App 48-49, 52-53) Based upon the jury's unanimous recommendations, the trial court sentenced McNeil to death in both cases.

Following supplemental briefing and arguments on the effect, if any, of the intervening decision in ***Mills v. Maryland***, 486 U.S. 367 (1988), ***State v. McNeil***, 322 N.C. 477, 370 S.E.2d 241 (1988), on February 9, 1989 the North Carolina Supreme Court affirmed McNeil's convictions and death sentences, rejecting the ***Mills*** unanimity issue for the reasons expressed in ***State v. McKoy***, 323 N.C. 1, 30-44, 372 S.E.2d 12, 27-36 (1988). ***State v. McNeil***, 324 N.C. at 58, 375 S.E.2d at 924.

McKoy subsequently petitioned this Court for a writ of certiorari on the ***Mills*** issue, and on February 21, 1989, this Court granted McKoy's petition. ***McKoy v. North Carolina***, 489 U.S. ____, 109 S.Ct. 1117 (1989).

On April 20, 1989, McNeil filed a Petition for Writ of Certiorari raising ***inter alia*** the ***Mills*** unanimity issue.

The arguments in ***McKoy*** were heard on October 10, 1989, and on March 5, 1990 a majority of this Court held that North Carolina's express unanimity requirement for the finding of mitigating circumstances unconstitutionally limits the jurors' consideration of mitigating evidence in violation of ***Mills***. ***McKoy v. North Carolina***, 494 U.S. ____, 110 S.Ct. 1227 (1990).

On March 26, 1990, with four Justices dissenting, this Court summarily granted certiorari, vacated the judgment of the North Carolina Supreme Court, and remanded the ***McNeil*** case for further consideration in light of ***McKoy v. North Carolina, supra***. ***McNeil v. North Carolina***, 494 U.S. ____, 110 S.Ct. 1516 (1990). Justice Kennedy, who concurred with the majority in ***McKoy v. North Carolina, supra***, wrote the dissent, in which the Chief Justice and Justices O'Connor and Scalia joined. Justice Kennedy noted that while the Court may have taken "a prudent course" in light of the intervening decision in ***McKoy v. North Carolina, supra***, he nevertheless was satisfied that there was no basis upon which the Court should disturb McNeil's death sentences. Justice Kennedy wrote:

> The record shows that the unanimity instruction held unconstitutional in ***McKoy*** was ***not*** given in petitioner's trial. Neither did the verdict form given to the jurors contain any unanimity requirement as to mitigating circumstances. The form, reproduced as Appendix E to the petition for certiorari, required unanimity as to the presence of aggravating factors (issue one) and as to the result of the weighing stages of the statute (issues three and four), but not as to presence of mitigating factors (issue two). Given the express unanimity requirement as to issues one, three, and four, but the omission of any such requirement as to issue two on the verdict form, no reasonable juror would have interpreted the form or the instructions to require unanimity as to mitigating factors.

McNeil v. North Carolina, 494 U.S. at ____, 110 S.Ct. at 1516 (Kennedy, J., dissenting from Court's grant of certiorari, vacating judgment and remanding for further consideration in light of ***McKoy v. North Carolina, supra***). Justice Kennedy, speaking for the four dissenters, emphasized that the state court was free to conclude on remand that ***McKoy v. North Carolina, supra***, was distinguishable because of the absence of the unanimity requirement as to mitigating circumstances. ***Id***. (the North

Carolina Supreme Court "remains free" to consider the distinction "that the unanimity instructions held unconstitutional in ***McKoy*** were ***not*** given in [McNeil's] trial.") (emphasis in original).

On March 27, 1990, McNeil filed a Motion to Remand for the Imposition of Life Sentences or Motion to Permit Supplemental Briefing, arguing that in ***McKoy v. North Carolina***, ***supra***, this Court necessarily held North Carolina's capital sentencing scheme unconstitutional and, therefore, under state law he was entitled to the imposition of life sentences in lieu of resentencing.

On April 3, 1990, the North Carolina Supreme Court ordered expedited briefing and oral arguments in the remands of ***McKoy v. North Carolina***, ***supra***, and ***McNeil v. North Carolina***, ***supra***, "limited to the issues presented by the order of the Supreme Court of the United States remanding the case to this Court." ***State v. McKoy***, 326 N.C. 592, 391 S.E.2d 815 (1990); ***State v. McNeil***, 326 N.C. 593, 391 S.E.2d 816 (1990).

The arguments in ***McKoy*** and ***McNeil*** were heard before the North Carolina Supreme Court on May 14, 1990, and on July 26, 1990 the court decided ***State v. McKoy***, 327 N.C. 31, 394 S.E.2d 426 (1990). In ***McKoy***, Chief Justice Exum, writing for a unanimous court, held that ***McKoy v. North Carolina***, ***supra***, did not render the North Carolina capital punishment statute unconstitutional or cause any sentence thereunder to be ***per se*** "arbitrary" within the meaning of N.C.Gen.Stat. §15A-2000(d)(2) (1983). ***State v. McKoy***, 327 N.C. at 37-43, 394 S.E.2d at 429-33. Chief Justice Exum further wrote that nothing bars resentencings in ***McKoy*** error cases, and that a reviewing court may apply harmless error analysis. ***Id.*** at 43-44, 394 S.E.2d at 433-34. However, applying such harmless error analysis to the facts in ***McKoy***, the court held that the jury failed to find unanimously several proposed mitigating circumstances which were supported by substantial evidence and, therefore, the state had not demonstrated the ***McKoy*** error to be harmless beyond a

reasonable doubt. ***Id.*** at 45, 394 S.E.2d at 433-34. The court vacated McKoy's death sentence and remanded his case for a new capital sentencing proceeding.

On August 29, 1990, the North Carolina Supreme Court filed its opinion in ***State v. McNeil***, 327 N.C. 388, 395 S.E.2d 106 (1990), holding that even though the sentencing instructions and verdict form did not expressly contain a unanimity requirement regarding the finding of mitigating circumstances, "when viewed in the context of the overall charge, there is a reasonable likelihood that the jury interpreted the instructions here to require unanimity as to mitigating circumstances." ***Id.*** at 392, 395 S.E.2d at 109. The court emphasized that "[a]lthough the trial court never explicitly stated that the jury had to be unanimous concerning mitigating circumstances under Issue Two on the forms used, the trial court stated at least three times that the jury's answers to ***all*** the issues must be unanimous." ***Id.*** at 393, 395 S.E.2d at 109 (emphasis original). The court never mentioned Justice Kennedy's dissent from this Court's grant of certiorari, and also did not attempt to distinguish similar "silent instruction" cases to the contrary. Having found ***McKoy*** error, the court proceeded to hold that the State had failed to show the error was harmless since the verdict form revealed only that the jury found one or more mitigating circumstances and it could not be determined which of the factors submitted to the jury were, in fact, found. ***Id.*** at 394, 395 S.E.2d at 110. The court concluded that since there was substantial evidence that each of the non-found mitigating circumstances existed and the unanimity requirement may have precluded a juror from finding a circumstance which he or she thought had been established but which the jury did not unanimously find, the ***McKoy*** error had not been shown to be harmless. ***Id.*** Accordingly, the court also vacated McNeil's death sentences and remanded his case for a new capital sentencing proceeding.

REASONS WHY THE WRIT SHOULD ISSUE

THE NORTH CAROLINA SUPREME COURT'S DECISION HOLDING *MCKOY V. NORTH CAROLINA, SUPRA*, APPLICABLE TO THE CAPITAL SENTENCING INSTRUCTIONS AT MCNEIL'S TRIAL IS IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL AND STATE COURTS, AND RAISES AN IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW WHICH IS WORTHY OF CERTIORARI REVIEW.

In ***McKoy v. North Carolina***, ***supra***, this Court held unconstitutional North Carolina's procedure, first approved in ***State v. Kirkley***, 308 N.C. 196, 217-18, 302 S.E.2d 144, 156 (1983), of requiring that jurors in capital cases ***unanimously*** agree upon the existence of a mitigating circumstance before that circumstance could be considered during sentencing deliberations. However, McNeil's trial in 1984 was conducted prior to the revision of North Carolina's pattern jury instructions to reflect this unanimity requirement, and thus his sentencing instructions regarding mitigating circumstances differed significantly from those found unconstitutional in ***McKoy***. The North Carolina Supreme Court summarized this distinction as follows:

> Issue Two on the forms used in ***McKoy*** was: "Do you ***unanimously*** find from the evidence the existence of one or more of the following mitigating circumstances?" ***McKoy***, 494 U.S. at ____, 110 S.Ct. at 1230 (emphasis added). That general question was followed by a list of possible mitigating circumstances. ***Id.*** Alongside each possible mitigating circumstance, a space was provided for the jury to answer whether it had unanimously found that particular circumstance to exist. ***Id.*** Therefore, the jury instructions in ***McKoy*** differed from the jury instructions [in ***McNeil***] in two respects: (1) Issue Two on the

> jury forms used in this case contained no express requirement that the jury be unanimous before finding the existence of a mitigating circumstance; and (2) the jury in this case was not required to state whether it found each individually listed possible mitigating circumstance to exist.

State v. McNeil, 327 N.C. at 392, 395 S.E.2d at 109.

On remand, the North Carolina Supreme Court addressed the applicability of ***McKoy v. North Carolina, supra***, to the trial court's non-explicit sentencing instructions at McNeil's sentencing proceeding, and correctly couched the issue as whether there was a "reasonable likelihood" the jury here believed it was required to apply "the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," citing ***Boyde v. California***, 494 U.S. ____, ____, 110 S.Ct. 1190, 1198 (1990). ***State v. McNeil***, 327 N.C. at 392, 395 S.E.2d at 109. However, the court rejected the State's argument, as well as the clearly-stated view of the four dissenters in ***McNeil v. North Carolina, supra*** at ____, 110 S.Ct. at 1516-17 (Kennedy, J., dissenting, and joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia), that since Issue Two in the sentencing instructions and on the verdict forms did not contain an ***express*** unanimity requirement, the jury must have understood that it was not required to be unanimous as to the existence of mitigating circumstances. This decision is in conflict with many other federal and state courts, and warrants review on certiorari to resolve this conflict. Supreme Court Rule 10.1(a).

It is beyond dispute that the sentencing instructions given at McNeil's trial are distinguishable from the ones found constitutionally infirm in ***Mills v. Maryland, supra*** and ***McKoy v. North Carolina, supra***. Unlike ***Mills*** and ***McKoy***, here the trial court's charge and the "Issues and Recommendation as to Punishment" forms expressly did not require unanimity as to the finding of mitigating circumstances. Viewed in context of the overall charge, there is no reasonable likelihood that a juror might have understood he or she was precluded from considering a mitigating circumstance unless the factor unanimously was agreed upon

by all twelve jurors. ***See Boyde v. California***, 494 U.S. at ____, 110 S.Ct. at 1198 ("Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a ***possibility*** of such an inhibition.") (emphasis added). Four Justices of this Court already have expressed the view, in their dissent from the remand for reconsideration in light of ***McKoy v. North Carolina, supra***, that given the express unanimity requirement on other sentencing issues, but the omission of any such requirement as to mitigating circumstances, "no reasonable juror would have interpreted the form or the instructions to require unanimity as to mitigating factors." ***McNeil v. North Carolina***, 494 U.S. at ____, 110 S.Ct. at 1516-17 (Kennedy, J., dissenting). In essence, the four dissenters recognized the maxim of ***expressio unius est exclusio alterius*** (mention or expression of one thing implies the exclusion of another). Under this maxim, a comparison of the sentencing instructions in McNeil's case shows there was no ***Mills/McKoy*** error such as would have required the North Carolina Supreme Court to engage in harmless error analysis or remand the case for resentencing.

In ***Mills***, this Court reversed a death sentence imposed under Maryland's capital punishment scheme because the jury instructions and verdict form created "a substantial probability that reasonable jurors . . . well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." ***Mills v. Maryland***, 486 U.S. at 384. The jury in ***Mills*** was instructed, both by the trial court's charge and the verdict form, that its findings of mitigating circumstances had to be unanimous. ***Id.*** at 391-93 (Rehnquist, C.J., dissenting). ***See also***, ***McKoy v. North Carolina***, 494 U.S. at ____, 110 S.Ct. at 1233 ("The Maryland scheme in ***Mills*** also required unanimity on both mitigating and aggravating circumstances."). However, the Maryland Court of Appeals had adopted what it regarded as a "saving construction of the statute (i.e., permitting a single juror's view to preclude rejection of a mitigating circumstance) and had said that the verdict form should be understood in that fashion." ***McKoy v. North Carolina***, 494 U.S. at ____, 110 S.Ct. at 1243 (Scalia, J., dissenting). The only issue disputed by the parties in

Mills was whether a reasonable jury could have interpreted the instructions and verdict form as requiring it to reject all non-unanimously found mitigating circumstances. Therefore, the ambiguity in ***Mills*** concerned only whether the jury had to unanimously reject a mitigating circumstance in order to mark "no" on the verdict form.

The recent case of ***McKoy v. North Carolina***, ***supra***, directly presented this Court with the more basic, underlying issue whether a state may require explicitly that only unanimously found mitigating circumstances may be considered by a capital sentencing jury. A majority of the Court held unconstitutional North Carolina's express unanimity requirement for the finding of mitigating circumstances. Justice Marshall, writing for the majority in ***McKoy***, concluded that "North Carolina's unanimity requirement impermissibly limits jurors' consideration of mitigating evidence and hence is contrary to [the Court's] decision in ***Mills***." ***McKoy v. North Carolina***, 494 U.S. at ____, 110 S.Ct. at 1234. However, Justice Marshall emphasized that the instructions and verdict form at issue in ***McKoy*** explicitly limited the jury's consideration to mitigating circumstances unanimously found:

> In fact, this case presents an even clearer case for reversal than ***Mills v. Maryland***, 486 U.S. 367 (1988). In ***Mills***, the Court divided over the issue whether a reasonable juror could have interpreted the instructions in that case as allowing individual jurors to consider only mitigating circumstances that the jury unanimously found. [citations omitted] Indeed, the dissent in ***Mills*** did not challenge the Court's holding that the instructions, if so interpreted, were unconstitutional. ***In this case, by contrast, the instructions and verdict form expressly limited the jury's consideration to mitigating circumstances unanimously found.***

McKoy v. North Carolina, 494 U.S. at ____ n. 8, 110 S.Ct. at 1234 n. 8 (emphasis added).

Therefore, the issue here is whether the ***Mills/McKoy*** error can be imputed to the sentencing instructions at McNeil's trial, which explicitly did **not** require that mitigating circumstances be found unanimously. Where a defendant attacks a trial court's capital sentencing instructions as unconstitutionally ambiguous, "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." ***Boyde v. California***, 494 U.S. ____, 110 S.Ct. at 1198.

> Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, ***a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition***. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. at ____, 110 S.Ct. at 1198 (emphasis added). ***See also, McKoy v. North Carolina***, 494 U.S. at ____, 110 S.Ct. at 1235 ("Ambiguous jury instructions, even in a capital case, do not violate the Eighth Amendment simply because they are ambiguous.") (Blackmun, J., concurring).

Applying the ***Boyde*** standard to the instant facts, as Justice Kennedy implicitly did in his dissent from the remand in this case, ***McNeil v. North Carolina***, 494 U.S. at ____, 110 S.Ct. at 1516-17 ("no reasonable juror would have interpreted the form or the instructions to require unanimity as to mitigating factors") (Kennedy, J., dissenting), there is no reasonable likelihood that the jurors at McNeil's trial interpreted the trial court's non-explicit sentencing instructions to preclude consideration of mitigating circumstances unless unanimously found by the jury. At most, there is only the "possibility" that the jury here would have believed the mitigating circumstances had to be found unanimously, and "a capital sentencing proceeding is not inconsistent with the Eighth Amendment ***if there is only a possibility of such an inhibition***." ***Boyde v. California***, 494 U.S. at ____, 110 S.Ct. at 1198 (emphasis added).

The charge here followed the pre-***Kirkley*** pattern jury instructions of N.C.P.I.-Crim. §150.10 (Repl. May 1980).[5] (App 18-35) In contrast to both ***Mills*** and ***McKoy***, neither the sentencing instructions nor the verdict forms required the jury to find the mitigating circumstances unanimously. The trial court began the sentencing charge by admonishing the jury that "[i]t is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or might like it to be." (App 18) The trial court then instructed that there were three factors which the State had to prove from the evidence beyond a reasonable doubt, and that the jury had to find each of these factors unanimously: (1) that there were one or more aggravating circumstan-

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5 The pattern jury instructions were updated to incorporate the ***Kirkley*** unanimity requirement for mitigating circumstances in February of 1985. N.C.P.I.-Crim. §150.10 (Repl. Feb. 1985).

ces; (2) that any mitigating circumstances found were insufficient to outweigh any aggravating circumstances found; and, (3) that any aggravating circumstances found were sufficiently substantial to warrant the imposition of the death penalty when considered with any mitigating circumstances found. (App 21-22) As to the jury's findings of mitigating circumstances and its answer to Issue Two on the "Issues and Recommendation" forms, the trial court informed the jury as follows:

> Now in each of the two cases six possible mitigating circumstances are listed on the form. You should consider each of them before answering Issue Two in each case.
>
> A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders. Our law identifies several possible mitigating circumstances. However, in considering Issue Two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character or record and any of the circumstances of a particular murder that the defendant contends is a basis for a sentence less than death, and any other circumstances arising from the evidence that you deem to have mitigating value.
>
> ***The defendant has the burden of proving to you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence taken as a whole must satisfy you, not beyond a reasonable doubt,***

> ***but simply satisfy you that any mitigating circumstance exists. If the evidence satisfies you that a mitigating circumstance exists, you would find that circumstance; if not, you would not find it.*** In either event, you would move on to consider the other mitigating circumstances and continue in like manner until you have considered all of the mitigating circumstances listed on the form and any others which you deem to have mitigating value.

(App 27-28) (emphasis added). The trial court then proceeded to instruct the jury on the six mitigating circumstances submitted for consideration. (App 28-30) The jury was instructed to answer Issue Two as follows: "If in a particular case you find one or more mitigating circumstances, then you would answer Issue Two 'Yes' for that case. If you do not find at least one mitigating circumstance from the evidence, then you would answer Issue Two 'No' in that case." (App 31) The instructions did not require the jury to specify which, if any, of the mitigating circumstances were found. Likewise, the jury was not told in counsel's jury arguments that there was a unanimity requirement for the finding of mitigating circumstances.

The written "Issues and Recommendation" forms, which were submitted to the jury following the conclusion of the sentencing instructions, contained no reference to a unanimity requirement for the finding of mitigating circumstances. (App 48-49, 52-53) The term "unanimously" was utilized under Issues One, Three, and Four, but not in Issue Two as to the finding of one or more mitigating circumstances.

Therefore, unlike ***Mills*** and ***McKoy***, which both addressed instructions explicitly requiring that mitigating circumstances be found unanimously, there was no reasonable likelihood in this case that a juror might have understood he or she was precluded from considering a mitigating circumstance unless the factor was unanimously agreed upon by all twelve jurors. The trial court used the term "unanimously" in reference to the requirement that the sentencing recommendation be agreed

upon by a unanimous jury, to the findings of aggravating circumstances, to the weighing of aggravating and mitigating circumstances found, and to the finding that the aggravating circumstances were sufficiently substantial to warrant imposition of death. (App 21-22) The trial court clearly did not charge the jury at the sentencing phase to find the mitigating circumstances unanimously, and the jury did not inquire if the required findings on the Issues and Recommendation forms relating to mitigating circumstances needed to be found unanimously. A reasonable jury hearing these sentencing instructions, and applying a "commonsense understanding of the instructions," ***Boyde v. California***, 494 U.S. at ____, 110 S.Ct. at 1198, immediately would have noticed the conspicuous absence of the unanimity requirement for the finding of mitigating circumstances in both the instructions and on the Issues forms. The jury, in obedience to the trial court's admonition to apply only the law as given, as well as the maxim of ***expressio unius est exclusio alterius***, reasonably would have deduced that there was no such unanimity requirement for finding mitigating circumstances or else the trial court would have said so in the instructions or on the Issues forms. The jury was not free to impute such an unanimity requirement from the otherwise silent instructions.

This reasonable interpretation of the sentencing instructions is supported by other factors, including the fact that the trial court did not require the jury to specify or list in writing which, if any, of the mitigating circumstances were found to exist. Since the jury only had to answer whether or not it found one or more mitigating circumstances, this procedure left to the individual jurors's own judgment which, if any, of the mitigating circumstances that particular juror deemed to be proven. In contrast, the jury had to answer collectively each of the aggravating circumstances with a unanimous "yes" or "no." When the jury reached the weighing stage of Issue Three, the individual jurors necessarily weighed the unanimously found aggravating circumstances against the mitigating circumstance or circumstances each juror (not the unanimous jury) found. There was never a listing or identification of any mitigating circumstances found by all twelve members of the jury; the jury only acknowledged that it found one or more such mitigating circumstances. Similarly, under Issue Four, the jury assessed the substantiality of the

aggravating circumstances against the mitigating circumstance or circumstances ***each*** individual juror deemed to exist. The difference here in the listing requirements for aggravating and mitigating circumstances contradicts any suggestion by McNeil that the jurors would have understood the instructions to require unanimity as to the finding of mitigating circumstances in his case. ***See State v. Thompson***, 768 S.W.2d 239, 250-51 (Tenn. 1989) (jury was not required to list or agree unanimously upon the existence of any mitigating factors).

The North Carolina Supreme Court rejected this reasonable interpretation of the sentencing instructions and based its decision, in large degree, on the fact that the trial court stated "at least three times that the jury's answers ***to all*** the issues must be unanimous." ***State v. McNeil***, 327 N.C. at 393, 395 S.E.2d at 109 (emphasis original). While there were three instances in which the trial court reminded the jury that it must be unanimous on each of the issues (App 34, 39, 40), close scrutiny of these supplemental instructions in context shows that the court did not imply unanimity was required on Issue Two as to mitigating circumstances. These instructions merely underscored the unanimity requirement as to the jury's ultimate sentencing recommendation, and the requisite three issues the State had to prove unanimously in order for the jury to return a death sentence. In the first instance, the trial court clearly was admonishing the jury that its final sentencing recommendation had to be unanimous: "Your decision, your answers to any of the issues ***as to your final recommendation*** must be unanimous, all twelve of you agree." (App 34) (emphasis added) Similarly, in the second instance the trial court again referred to the sentencing recommendation: "Now as I indicated in my instructions to you, of course your answers to each of the issues in each case must be unanimous ***in your recommendation*** in each case. It must be a ***unanimous recommendation***." (App 39) (emphasis added) The third instance merely was a reference to whether the jury unanimously had decided "such other issues that you are not considering Issue Number Four." (App 40) Contrary to the North Carolina Supreme Court's holding, the jurors would not have imputed from these supplemental remarks that there also was a unanimity requirement for the finding of mitigating circumstances, particularly when the earlier, more comprehensive instructions had

not referred to such a requirement and the "Issues and Recommendation" forms, which the jurors had before them during their deliberations, contained no such reference under Issue Two.

Moreover, to the extent that these supplemental instructions could be interpreted as requiring unanimity on all issues, the only "issue" submitted to the jury under Issue Two was whether it found one or more of the mitigating circumstances, not which ones were found. Therefore, at most, the unanimity requirement only can be construed in reference to the general issue of the existence of one or more mitigating circumstances, and not the underlying findings of the mitigating circumstance or circumstances which supported the jury's answer to Issue Two.

Similarly, the trial court's use of terminology such as "you" and "your" in connection with the findings of mitigating circumstances (App 27-31), did not, in itself, suggest that the jury had to be unanimous as to the findings of mitigating circumstances. Although the trial court utilized such collective terms in its instructions on the other issues which did, by law, require unanimous agreement, its references to "you" and "your" under Issue Two must have been understood in the singular rather than plural tense and vernacular of these pronouns. Since it is elementary that these pronouns may be either singular or plural, Webster's Ninth New Collegiate Dictionary at 1369 (1984), a reviewing court should examine the terms in context to ascertain how the jury interpreted the language. Given the conspicuous omission of the unanimity requirement only as to the existence of mitigating circumstances and the absence of any directive that the jury list the mitigating circumstance or circumstances found to exist, the logical, commonsense understanding of most reasonable jurors would have been that they, as individuals (rather than the jury as a whole), were free to determine which, if any, of the mitigating circumstances had been proven by McNeil.

Predictably, even in "weighing" states which do not require explicit findings of mitigating circumstances or which expressly do not instruct the jury how to make such findings, many capital defendants have attempted to exploit the ***Mills/McKoy*** issue by raising the similar argument that the

unanimity requirement for mitigating circumstances reasonably may be imputed or inferred from the sentencing instructions in their cases. However, unlike the North Carolina Supreme Court's decision in ***McNeil***, their arguments generally have met rejection in the overwhelming majority of federal and state courts. ***Kordenbrock v. Scroggy***, 680 F.Supp. 867, 892-93 (E.D.Ky. 1988) (Although state court instructed jury that aggravating factors had to be found unanimously, nothing in instructions would have led reasonable juror to believe that finding mitigating factor also required unanimity; jury would not have inferred from silence that unanimity also was a requirement for finding a mitigating factor), ***aff'd***, 889 F.2d 69 (6th Cir. 1989), ***vacated and rehearing en banc pending***, 896 F.2d 1457 (6th Cir.), ***rev'd on other grounds***, ___ F.2d ___ (6th Cir., Nov. 21, 1990) (***en banc***); ***State v. Petary***, 790 S.W.2d 243, 244-46 (Mo. banc 1990) (no reasonable likelihood jurors would have interpreted sentencing instructions as limiting consideration to unanimously found mitigating circumstances, even though jurors expressly were instructed to return sentence of life imprisonment "[i]f you ***unanimously*** find that one or more mitigating circumstances exist sufficient to outweigh the aggravating circumstances found by you to exist") (emphasis added), ***cert. denied***, ____ U.S. ____, 59 U.S.L.W. 3363 (Nov. 13, 1990); ***People v. Rodriguez***, 794 P.2d 965, 980-81 (Colo. 1990) (no reasonable likelihood sentencing instructions foreclosed jury from considering and giving effect to relevant mitigating evidence unless unanimous where only requirements of unanimity imposed by instructions related to finding of specified aggravating factors and verdict of death, and there was no affirmative instruction that jury could not consider or give effect to a mitigating factor if jury was less than unanimous), ***citing***, ***People v. Davis***, 794 P.2d 159, 194-96 (Colo. 1990); ***State v. Green***, ____ S.C. ____, ____, 392 S.E.2d 157, 163 (1990) (judge did not impermissibly convey to jury that mitigating circumstance only could be considered if jury unanimously determined it was present; "unanimous" was used only in relation to jury's verdict and the existence of aggravating circumstances), ***cert. denied***, ____ U.S. ____, 111 S.Ct. 229 (1990); ***State v. Patterson***, 299 S.C. 280, 286, 384 S.E.2d 699, 703 (1989) (where trial court properly instructed jury that in order to find an aggravating circumstance it must do so by unanimous agreement and also that sentencing verdict must be unanimous,

the court's failure to specify that a finding of a mitigating circumstance need not be unanimous could not have led jurors erroneously to conclude that such a finding likewise must be unanimous; nothing in the charge insinuated life could be given only upon a unanimous finding of a mitigating circumstance), ***cert. granted, judgment vacated, and remanded for further consideration on other grounds***, ____ U.S. ____, 110 S.Ct. 709 (1990), ***reaffirmed in***, ____ S.C. ____, 396 S.E.2d 366 (1990); ***Ex parte Martin***, 548 So.2d 496, 498 (Ala. Cr. App. 1989) (jurors reasonably could not have believed that they were required to agree unanimously on existence of any particular mitigating factor), ***cert. denied***, ____ U.S. ____, 110 S.Ct. 419 (1989); ***Commonwealth v. Frey***, 520 Pa. 338, 346-48, 554 A.2d 27, 30-31 (1989) (***Mills*** not violated where neither the sentencing instructions nor the verdict slip form expressed a need for unanimity in determining the existence of mitigating circumstances), ***cert. denied***, ____ U.S. ____, 110 S.Ct. 1500 (1990); ***State v. Clark***, 108 N.M. 288, 772 P.2d. 322 (1989) (silent instructions do not raise any concern under ***Mills***). ***But see, State v. Henderson***, 109 N.M. 655, 664, 789 P.2d 603, 612 (1990) (court reversed the case for errors in aggravating circumstances, ruling that on remand the sentencing instructions explicitly should tell the jurors they need not be unanimous on mitigation; disapproves of any language in ***Clark*** which would continue non-explicit instructions on unanimity). ***Cf., House v. Tennessee***, ____ U.S. ____, ____, 111 S.Ct. 284, 284-87 (1990) (Marshall, J., dissenting from denial of certiorari on issue whether Tennessee capital sentencing instructions, which did not require jury to list or vote upon the specific mitigating factors and required unanimity only as to the finding of aggravating circumstances, violated ***Mills*** and ***McKoy***). ***Compare, Kubat v. Thieret***, 867 F.2d 351, 371-74 (7th Cir.) (Illinois trial court's instructions which required unanimous agreement as to the sufficiency of mitigating factors to preclude death sentence held to violate ***Mills***), ***cert. denied sub nom., Kubat v. Greer***, ____ U.S. ____, 110 S.Ct. 206 (1989).

Therefore, the conflict between the North Carolina Supreme Court's holding in ***McNeil*** and other federal and state court decisions remains unsettled and warrants resolution as to whether ***Mills*** and ***McKoy*** are applicable to cases where the jury was not explicitly instructed concerning the unanimity require-

ment for finding mitigating circumstances. Contrary to the decision in ***McNeil***, a reasonable juror receiving the sentencing instructions at McNeil's trial would not have imputed the unanimity requirement found unconstitutional in ***McKoy*** to his or her findings of mitigating circumstances. According to the overwhelming majority of the federal and state courts which have addressed the issue under similar sentencing instructions, and as four Justices of this Court already have opined in this very case, such an unanimity requirement cannot be presumed from silent, non-explicit sentencing instructions.

CONCLUSION

For the foregoing reasons, the State respectfully prays and requests that a writ of certiorari issue to review the decision of the North Carolina Supreme Court vacating McNeil's death sentences and remanding his case for a new capital sentencing proceeding.

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

STATE OF NORTH CAROLINA,

Petitioner,

v.

LEROY MCNEIL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

APPENDIX

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OPINION OF THE NORTH CAROLINA SUPREME COURT

State v. Leroy McNeil

[caption omitted]

On remand by the Supreme Court of the United States, 494 U.S. ___, 110 S.Ct. 1516, 108 L.Ed.2d 756 (1990), to the Supreme Court of North Carolina for further consideration in light of ***McKoy v. North Carolina***, 494 U.S. ___, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). Heard on remand in the Supreme Court of North Carolina on 14 May 1990.

LACY H. THORNBURG, Attorney General, by William N. Farrell, Jr., Joan H. Byers, and Steven F. Bryant, Special Deputy Attorneys General, and Barry S. McNeill, Assistant Attorney General, for the State.

MALCOLM RAY HUNTER, JR., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

At the 30 April 1984 Criminal Session of Superior Court, Wake County, the defendant was convicted of two counts of first-degree murder for the murders of Deborah Jean Fore and Elizabeth Faye Stallings. The jury found the defendant guilty of each first-degree murder, both upon the theory of premeditation and deliberation and under the felony murder rule. Upon the jury's recommendations after a separate capital sentencing proceeding, the trial court sentenced the defendant to death for each murder. On the defendant's direct appeal, this Court -- in an opinion written by Justice Whichard, with Chief Justice Exum concurring in a separate opinion and Justice Frye dissenting as to sentence -- found no error and upheld the convictions and death sentences. ***State v. McNeil***, 324 N.C. 33, 375 S.E.2d 909 (1989). Thereafter, the Supreme Court of the United States granted the defendant's petition for a writ of certiorari and remanded the case

for our further consideration in light of that Court's recent decision in ***McKoy v. North Carolina***, 494 U.S. ___, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). ***McNeil v. North Carolina***, 494 U.S. ___, 110 S.Ct. 1516, 108 L.Ed.2d 756 (1990).

The evidence supporting the defendant's convictions and death sentences is summarized in this Court's prior opinion, ***State v. McNeil***, 324 N.C. 33, 375 S.E.2d 909, and we will not repeat it here except as necessary to discuss the questions put before us on remand by the Supreme Court of the United States. On remand, we are required to answer three questions. First, did the jury instructions given at the defendant's sentencing proceeding create an unacceptable risk that individual jurors were prevented from considering mitigating evidence in making their sentencing decision, thereby violating the Eighth Amendment as construed by the Supreme Court of the United States in ***McKoy***? We are required to answer this question affirmatively. Second, may harmless error analysis be used in reviewing any such constitutional error in this case? We answer this question affirmatively. Third, was the error in this case harmless? In light of the recent decision by the Supreme Court of the United States in ***McKoy***, we are required to answer this question negatively. Accordingly, we must now vacate the death sentences previously upheld by this Court on the direct appeal of this case. We must also remand the case to the Superior Court, Wake County, for a new capital sentencing proceeding.

I.

We first consider whether the jury instructions given at the defendant's sentencing proceeding violated the Eighth Amendment, as recently construed by the Supreme Court of the United States in ***McKoy***, by creating an unacceptable risk that individual jurors were prevented from "consider[ing] and giv[ing] effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death. . . ." ***McKoy v. North Carolina***, 494 U.S. ___, ___, 110 S.Ct. 1227, 1233, 108 L.Ed.2d 369, 381 (1990); ***see Mills v. Maryland***, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). For the reasons ex-

plained below, we conclude that the same type of error discovered and announced by the Supreme Court of the United States in ***McKoy*** was present here.

A.

During the capital sentencing proceeding conducted after the defendant McNeil's trial, the trial court gave the jury printed forms the jury was to use in recording and returning its recommendations as to punishment. As the defendant had been convicted of two first-degree murders, the jury was given two such forms; each was entitled "Issues and Recommendation as to Punishment." Each form contained four sections, labeled "Issue One" through "Issue Four."

Issue One on each form was "Do you ***unanimously*** find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?" (Emphasis added.) For the murder of Deborah Jean Fore, the trial court submitted two aggravating circumstances, both of which the jury found to exist: (1) that the defendant had "been previously convicted of a felony involving the use of violence to the person," and (2) that the murder was committed while the defendant "was engaged in the commission of a robbery with a firearm." For the murder of Elizabeth Faye Stallings, the trial court submitted the same two aggravating circumstances submitted for the Fore murder, plus a third, that the Stallings murder was "especially heinous, atrocious or cruel." The jury found all three of those aggravating circumstances to exist.

Issue Two was: "Do you find from the evidence the existence of one or more of the following mitigating circumstances?" For both the Fore and the Stallings murders, the trial court submitted six possible mitigating circumstances, each of which is discussed in detail at a later point in this opinion. Unlike Issue One which required the jury to give a specific answer as to each aggravating circumstance, the jury was not required under Issue Two to specify whether it found each individual mitigating circumstance to exist. As a result, for each murder the jury only answered "yes," it had found "one or more" mitigating circumstances.

Issue Three was: "Do you ***unanimously*** find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?" (Emphasis added.) The jury answered Issue Three "yes" for both the Fore and Stallings murders.

Issue Four was: "Do you ***unanimously*** find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?" (Emphasis added.) For each murder, the jury answered this issue "yes," and thereafter recommended that the defendant be sentenced to death for each murder.

B.

In ***McKoy v. North Carolina***, 494 U.S. ___, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), the Supreme Court of the United States held unconstitutional North Carolina's trial procedure in capital cases of requiring that jurors unanimously agree upon the existence of a mitigating circumstance before any juror could consider that circumstance during sentencing deliberations. The trial of this case in 1984, however, was held before our trial courts began to uniformly instruct juries as to that trial practice, and the jury instructions regarding mitigating circumstances here differed from those found unconstitutional in ***McKoy***.

Issue Two on the forms used in ***McKoy*** was: "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" ***McKoy***, 494 U.S. at ___, 110 S.Ct. at 1230, 108 L.Ed.2d at 376 (emphasis added). That general question was followed by a list of possible mitigating circumstances. ***Id.*** Alongside each possible mitigating circumstance, a space was provided for the jury to answer whether it had unanimously found that particular circumstance to exist. ***Id.*** Therefore, the jury instructions in ***McKoy*** differed from the jury instructions now before us in two respects: (1) Issue Two on the jury forms used in this case contained no express requirement that the jury be unanimous before finding the existence of

a mitigating circumstance; and (2) the jury in this case was not required to state whether it found each individually listed possible mitigating circumstance to exist.

The State contends that since Issue Two on the forms used in this case did not contain an ***express*** unanimity requirement, the jury must have understood that it was not required to be unanimous as to the existence of mitigating circumstances; thus, ***McKoy*** error was not present in the sentencing proceeding in this case. We disagree.

To determine whether the jury instructions in this case violated the Eighth Amendment as construed by the Supreme Court of the United States in ***McKoy***, we must decide whether there is a "reasonable likelihood" that the jury here believed it was required to apply "the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." ***Boyde v. California***, 494 U.S. ___, ___, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316, 329, ***reh'g denied***, ___ U.S. ___, 110 S.Ct. 1961, 109 L.Ed.2d 322 (1990). Issue Two on the forms given the jury in this case did not expressly contain a unanimity requirement regarding mitigating circumstances. However, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." ***Cupp v. Naughten***, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400-01, 38 L.Ed.2d 368, 373 (1973) (citing ***Boyd v. United States***, 271 U.S. 104, 107, 46 S.Ct. 442, 443, 70 L.Ed. 857, 859 (1926), quoted in ***Boyde v. California***, 494 U.S. at ___, 110 S.Ct. at 1196-97, 108 L.Ed.2d at 327; ***see also, e.g., Murrow v. Daniels***, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (citing ***Gregory v. Lynch***, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967) (citing cases)). We can only conclude that when viewed in the context of the overall charge, there is a reasonable likelihood that the jury interpreted the instructions here to require unanimity as to mitigating circumstances.

In its charge to the jury at the conclusion of the sentencing proceeding, the trial court used the word "unanimous" no less than thirteen times while instructing the jury concerning the two "Issues and Recommendation as to Punishment" forms that the jury was to complete. In the final mandate, the trial court

instructed the jury that: "Your decision, your answers to any of the issues as to your final recommendation must be unanimous. . . ." After the jurors had deliberated for approximately one day, the trial court inquired as to their progress. During that inquiry, the trial court stated: "Now as I indicated in my instructions to you, of course your answers to each of the issues must be unanimous in your recommendation in each case." Although the trial court never explicitly stated that the jury had to be unanimous concerning mitigating circumstances under Issue Two on the forms used, the trial court stated at least three times that the jury's answers to all the issues must be unanimous.

The State argues that the lack of an express unanimity requirement in Issue Two on the forms given the jury stands in plain contrast to the express unanimity requirements of Issue One, Three and Four on those forms, and thus no reasonable juror would have interpreted the forms or the instructions to require unanimity as to mitigating circumstances. We disagree. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the way lawyers might." ***Boyde v. California***, 494 U.S. at ___, 110 S.Ct. at 1198, 108 L.Ed.2d at 329. In this case in which the jurors were instructed at least three times by the trial court that they must be unanimous in their decisions on all the issues they answered, we are forced to conclude that, in their entirety, the jury instructions gave rise to a reasonable likelihood that some of the jurors were prevented from considering constitutionally relevant evidence. ***See id.*** The instructions thus contained the same type of error held to violate the Eighth Amendment by the Supreme Court of the United States in ***McKoy***.

II.

Having determined that a ***McKoy*** unanimity error occurred in this case, we must next consider whether a harmless error analysis may be undertaken. For the reason set forth in ***State v. McKoy***, 327 N.C. 31, 394 S.E.2d 426 (1990), we conclude that this case may be further examined to determine whether the constitutional error committed was harmless.

III.

As the ***McKoy*** error in the jury instructions was of constitutional magnitude, "[t]he burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. §15A-1443(b) (1988). On the record before us, we are forced to conclude that the State has not carried this burden.

The trial court submitted six possible mitigating circumstances for both the Fore and the Stallings murders: (1) that the defendant had "no significant history of prior criminal activity"; (2) that the defendant's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired"; (3) that the defendant "confessed to the crime and did so shortly after the crime was committed"; (4) that the defendant "has an I.Q. of seventy-eight and is borderline mentally retarded"; (5) that the defendant "had been a good and useful employee for Rea Construction Company" prior to the killings; and (6) the mitigating circumstance of "[a]ny other circumstance or circumstances arising from the evidence" which the jury deemed to have mitigating value. The jury was not required to indicate whether it found each individual mitigating circumstance to exist; instead, for each murder the jury only indicated on the form provided that, "yes," it had found "one or more" of the mitigating circumstances to exist.

Given the verdict forms used in this case, it is impossible for this Court to determine which, if any, of the five specifically worded mitigating circumstances the jury found to exist. Nor can we determine which, if any, "other [mitigating] circumstance or circumstances" the jury found to exist under the sixth or "catchall" circumstance on each list. We only know that the jury found "one or more" mitigating circumstances to exist as to each murder. Thus, if substantial evidence was introduced at trial to support any two or more mitigating circumstances, the ***McKoy*** error has not been shown to be harmless, because the erroneous unanimity requirement may have precluded a juror from con-

sidering a circumstance which he or she thought had been established by evidence and was mitigating but which the jury did not unanimously find.

We express no opinion as to the existence of any mitigating circumstances. However, our review of the record reveals that substantial evidence was introduced from which a juror might reasonably have found ***each*** of the mitigating circumstances submitted to exist.

The first possible mitigating circumstance submitted as to each murder was that the defendant had "no significant history of prior criminal activity." The evidence tended to show that in 1977, some seven years before the trial in this case, the defendant had pled guilty to voluntary manslaughter. Voluntary manslaughter is certainly a very significant crime. However, we are unable to say beyond a reasonable doubt that no juror could reasonably have found that a defendant's commission of a single very serious non-capital crime years before was ***not*** a significant ***history*** of prior criminal activity.

The second possible mitigating circumstance was that the defendant's capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired." There was evidence at trial that the defendant consumed substantial amounts of alcohol on the weekend of the murders in question here. Expert testimony indicated that the defendant was an alcoholic, and his consumption of alcohol "impaired his judgment and impaired his brain and in that sense was a contributing factor to whatever behavior he engaged in." Given such evidence, we are unable to say beyond a reasonable doubt that no juror could reasonably have found this circumstance to exist and to be mitigating.

The third possible mitigating circumstance was that the defendant "confessed to the crime and did so shortly after the crime was committed." The murders were committed on 8 April and 10 April 1983. The defendant was arrested on 21 April and confessed on 23 April 1983. Even though fifteen days passed between the first murder and the defendant's confession, we are

unable to say beyond a reasonable doubt that no juror could reasonably have found this time between the murders and the confession "short" enough to have some mitigating value.

The fourth possible mitigating circumstance was that the defendant "has an I.Q. of seventy-eight and is borderline mentally retarded." There was evidence supporting this possible mitigating circumstance, and a juror could reasonably have found this circumstance to exist and to be mitigating.

The fifth possible mitigating circumstance was that the defendant "had been a good and useful employee for Rea Construction Company" prior to the killings. There was substantial evidence supporting this possible mitigating circumstance. We are unable to say beyond a reasonable doubt that no juror could reasonably have found this circumstance to exist and to be mitigating.

The sixth possible mitigating circumstance was "[a]ny other circumstance or circumstances arising from the evidence" which the jury deemed to have mitigating value. The defendant argues that, among other circumstances in mitigation, one or more jurors could have found that the defendant's demeanor at trial showed regret and remorse or otherwise had mitigating value. The defendant contends that, under ***McKoy***, any such jurors should not have been prevented from finding and weighing such circumstances in their sentencing decision. "[E]vidence is not only what [jurors] hear on the stand but [is also] what they witness in the courtroom." ***State v. Brown***, 320 N.C. 179, 199, 358 S.E.2d 1, 15, ***cert. denied***, 484 U.S. 970, 108 S.Ct. 467, 98 L.Ed.2d 406 (1987). Given the evidence at trial and our inability to assess the defendant's demeanor from the written record, we are unable to say beyond a reasonable doubt that the defendant's contentions in this regard are without merit.

The State argues that no reasonable juror would have found any of the possible mitigating circumstances to exist with regard to either murder. However, the jury in this case in fact unanimously found as to each murder that "one or more" of the mitigating circumstances existed. Further, for reasons already

indicated, we are unable to say beyond a reasonable doubt that one or more jurors could not reasonably have found all of the possible mitigating circumstances submitted to exist and to have mitigating value.

The State also argues that even if found to exist by one or more jurors, none of the mitigating circumstances could have influenced the jury's sentencing recommendation as to either murder. The State's arguments in this regard do not establish beyond a reasonable doubt that no juror might find the mitigating circumstances, however weak, both to ***exist*** and to have ***some*** mitigating value. While we express no opinion as to the existence of any of these circumstances, we are unable to say that a reasonable juror could not have found each of them to exist and to have some mitigating value.

From the written forms returned by the jury, we can only know that the jury found "one or more" mitigating circumstances as to each murder. Therefore, we are unable to determine how many of the possible mitigating circumstances submitted by the trial court the jury unanimously found to exist and considered during sentencing. We do not know whether the trial court's instructions, which violated ***McKoy*** by requiring jury unanimity as to any mitigating circumstance, prevented any individual juror from finding an additional mitigating circumstance, not found by the other jurors, and giving it weight in mitigation in voting upon the jury's recommendation as to whether the defendant should live or die. Given this situation, we are required by the holding of the Supreme Court of the United States in its ***McKoy*** opinion to vacate the sentences of death against the defendant McNeil, previously upheld by this Court, and remand this case to the Superior Court, Wake County, for a new capital sentencing proceeding.

IV.

On this remand by the Supreme Court of the United States for reconsideration in light of its decision in ***McKoy***, the death sentences entered against the defendant and previously upheld by

this Court must be and are vacated. This case is remanded to the Superior Court, Wake County, for a new capital sentencing proceeding pursuant to N.C.G.S. §15A-2000.

DEATH SENTENCES VACATED; REMANDED FOR RESENTENCING.

SUBCHAPTER XV. CAPITAL PUNISHMENT

ARTICLE 100.

Capital Punishment.

§15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. --

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as

to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury.--Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death.--When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence.--

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating cir-

cumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances.--Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape

or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances.--Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 2; c. 682, s. 9; 1981, c. 652, s 1.)

COURT: Members of the jury, having found the defendant Leroy McNeil guilty of first degree murder of Elizabeth Stallings and Deborah Fore, it is now your duty to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment in each of these cases. Your recommendation will be binding upon this Court. If you unanimously recommend that this defendant be sentenced to death in either case, this Court will be required to impose a sentence of death in that case. If you unanimously recommend a sentence of life imprisonment in either case, and you must consider each case separately, the Court will be required to impose a sentence of life imprisonment in the State's prison.

Now all of the evidence relevant to your recommendation has been presented. There is no requirement to resubmit during the sentencing procedure any evidence that was submitted during the guilt phase of this case. All of the evidence which you heard in both phases of the case is competent for your consideration in recommending punishment.

It is now your duty to decide from all of the evidence presented in both phases what the facts are. You must then apply the law which I am about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or might like it to be. This is important, because justice requires everyone who is sentenced for first degree murder have the sentence recommendation determined in the same manner, and have the same law applied to him.

You, ladies and gentlemen, as the triers of fact, are again the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of what a witness has said on the stand.

In determining whether to believe any witness, you should apply those same tests of truthfulness which you apply in your everyday affairs in making your most important business decisions. As applied to this trial, these tests may include, among

others, the following: The opportunity of a witness to see, hear, know or remember the facts or occurrences about which he or she has testified; the manner and appearance of a witness; any interest, bias or prejudice the witness may have; the apparent understanding and fairness of the witness, whether the witness' testimony is reasonable and whether the witness' testimony is consistent with other believable evidence in the case.

You are again the sole judge of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable you must then determine the importance of that evidence in light of all other believable evidence in the case.

Now at this time, ladies and gentlemen, I shall very briefly summarize what some of the evidence presented by the State and some of the evidence presented by the defendant tends to show as to these two cases. In the case of the State of North Carolina versus Leroy McNeil, involving the first murder of Elizabeth Stallings, the State has offered evidence tending to show that on or about the 8th day of April, 1983, the defendant Leroy McNeil and his wife picked up the deceased, Elizabeth Faye Stallings, and they picked up Ms. Stallings with the inducement that they would go somewhere to party, to engage in activities together. That initially this was presented to Ms. Stallings as a very friendly kind of meeting. The defendant and Penny McNeil took Elizabeth Stallings to an abandoned house next to their house on the pretense of securing some controlled substances from that house. That through this ruse they were eventually able to get Elizabeth Stallings into the house and that at that time, consistent with the prearranged plan to do so, they proceeded to effectuate a robbery of the food stamps which Elizabeth Stallings had in her possession. Leroy McNeil took the food stamps from her; he beat her; he stabbed her; took her clothes off and that after securing a rifle, he shot her in the head and killed her. Now this was some of the evidence offered by the State as to that case tends to show.

The State additionally, as to that case and to the case involving the murder of Deborah Fore, at the sentencing hearing offered evidence tending to show that on the 18th day of May,

1977, Leroy McNeil entered a plea of guilty and was therefore convicted of the voluntary manslaughter of Cynthia Latham McNeil.

As to the case of State of North Carolina versus Leroy McNeil, involving the first degree murder of Deborah Fore, the State offered evidence tending to show that on or about the 10th day of April of 1973, the defendant Leroy McNeil discussed with his wife the fact that they needed money. That pursuant to that, he called Deborah Fore, an individual that he thought might have some money, on the pretense of taking her out on a date. Eventually, the defendant and Penny McNeil went to Deborah Fore's house. She got in the car with them, needing a ride to the store. That they drove around, finally driving to a secluded area of Wake County. At that time the defendant indicated that a tire on his car was going flat, as one actually was. He went back to the back of his car, opened the trunk. Prior to doing so, he had taken a pistol out from under the seat and armed himself with it. Eventually Deborah Fore got out of the car and came back to where the defendant was to see what the problem was with the tire. The defendant thereafter shot Deborah Fore in the head with the pistol, causing her death. After the defendant shot Deborah Fore, he removed from her person a small amount of U.S. currency, her keys and other items of personal property.

The defendant, as to each of these cases, has offered evidence tending to show that the defendant had been drinking heavily prior to the incident involving Elizabeth Stallings and prior to the incident involving Deborah Fore. The defendant was, in fact, an alcoholic, a habitual drinker and that his drinking impaired his judgment and his inhibitions and impaired his capacity to recognize the criminality of either of the acts.

The defendant further offered evidence tending to show that the defendant is an individual with a relatively low IQ; in fact, is borderline mentally retarded. That after his arrest and at his specific request he met with law enforcement officers and made a full and complete statement concerning all of these incidents.

Further, the defendant offered evidence tending to show that the defendant had been employed with a construction company here in Wake County and that he worked hard at that job. That even though he had some absentee problems related to his drinking, that he was a hard-working employee of that construction company.

This is what some of the evidence offered by the defendant as to each of these cases and in this sentencing hearing tends to show. Both as to the evidence offered by the State and the evidence offered by the defendant, I have summarized the evidence only very briefly. You should consider all of the evidence and if your recollection differs from mine, rely upon your own.

Additionally, I have only related what the evidence for the State and the evidence for the defendants tends to show, not what it does show, because, you, ladies and gentlemen, are the finders of the fact and, therefore, only you determine what the evidence does show.

So I charge that for you to recommend that this defendant be sentenced to death in either, in either the Stallings case or the Fore case, the State must prove three things from the evidence beyond a reasonable doubt. Now a reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of each of the following things:

First, that one or more aggravating circumstances exist.

Two, that any mitigating circumstances you have found are insufficient to outweigh any aggravating circumstances you have found.

Third, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances that you have found.

Again, it will be your responsibility to consider the aggravating and the mitigating circumstances separately as to each case and to make a separate decision as to each case. If in either case or in both you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that this defendant, Leroy McNeil, be sentenced to death. If you do not so find or if you have a reasonable doubt as to one or more of these things, in either case, then it would be your duty to recommend that the defendant be sentenced to life imprisonment in that case.

When you retire to deliberate your recommendations as to punishment, you will take with you two forms, one for each case, entitled "Issues and Recommendations as to Punishment." This form contains a written list of four issues relating to aggravating and mitigating circumstances. I will now take up these four issues in each case with you in greater detail, one by one, to enable you to follow me more easily. The bailiff will now give each of you a copy of two forms, each entitled "Issues and Recommendations as to Punishment." One form relates to the Deborah Fore case and that is indicated in the caption at the top of that form. The other form relates to the Elizabeth Stallings case and that is indicated in the caption at the top of that form. Mr. Sheriff, will you distribute one copy of these to each juror. Ladies and Gentlemen, please do not read ahead in the form, simply follow them with me as I go through them.

Issue Number One in the case involving the first degree murder of Elizabeth Faye Stallings reads as follows:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances in the case, in the murder involving Elizabeth Stallings?

In the case involving first degree murder of Deborah Fore would read as follows:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

In the case involving the first degree murder of Elizabeth Faye Stallings, three possible aggravating circumstances are listed on the form and you should consider each of them before you answer Issue Number One. Two possible aggravating circumstances are listed on the form in the case involving Deborah Fore and you should consider each of them before you answer Issue Number One.

Now the State must prove from the evidence beyond a reasonable doubt the existence of any aggravating circumstance, and, before you may find any aggravating circumstances you must agree unanimously that it has been so proven. An aggravating circumstance is a group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law, that being death. Our law identifies the aggravating circumstances which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as an aggravating, as aggravating circumstances. Under the evidence in the case involving the first degree murder of Elizabeth Stallings three possible aggravating circumstances may be considered. Under the evidence in the case involving the first degree murder of Deborah Fore, two possible aggravating circumstances may be considered. The following are the aggravating circumstances which may be applied to these cases.

First, the first aggravating circumstance, if it applies at all, would under the evidence in this case apply in both cases. It reads as follows:

First, has Leroy McNeil been previously convicted of a felony involving the use of violence to the person? Now voluntary manslaughter is by definition a felony involving the use of

violence to the person. Voluntary manslaughter is defined as the intentional and unlawful killing of a human being without malice, without premeditation and without deliberation.

A person has been previously convicted, if he has been convicted and not merely charged and if his conviction is based upon conduct which occurred before the events out of which these murders arose.

So if you find from the evidence beyond a reasonable doubt that on or about the 18th day of May, 1977, in Mecklenburg County Leroy McNeil had been convicted of voluntary manslaughter of Cynthia Latham McNeil and that he, Leroy McNeil, killed Elizabeth Stallings and Deborah Fore after he committed this voluntary manslaughter, then you would find this aggravating circumstance and would so indicate by having your foreperson write "Yes" in the space after this aggravating circumstance on the Issues and Recommendation Form of the Stallings case and the Fore case as appropriate.

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance and will so indicate by having your foreperson write "No" in that space in the Stallings case and in the Fore case as appropriate.

Second, was the murder, was this murder of Elizabeth Faye Stallings committed by Leroy McNeil while Leroy McNeil was engaged in the commission of robbery with a firearm?

Additionally, second, was this murder committed by Leroy McNeil while Leroy McNeil was engaged in the commission of robbery with a firearm as related to the murder of Deborah Fore?

As to this potential aggravating circumstance, you should consider the evidence separately in each of the two cases and you should focus separately on this issue in each of the two cases and your answer would be based upon your evaluation of the evidence as it relates to each of the two cases separately.

Robbery with a firearm is the taking and carrying away of any personal property of another from her person or in her presence without her consent by endangering or threatening a person with a firearm, with the intent to deprive her of the use of property permanently, the taker knowing that he was not entitled to take that property.

If you find from the evidence beyond a reasonable doubt that Leroy McNeil killed Elizabeth Stallings--excuse me, that when Leroy McNeil killed Elizabeth Stallings, Leroy McNeil was taking and carrying away a quantity of food stamps from the person and presence of Elizabeth Stallings without her voluntary consent, by endangering or threatening Elizabeth Stallings with a firearm, Leroy McNeil knowing that he was not entitled to take these food stamps and intending at that time to deprive Elizabeth Stallings of their use permanently, then you would find this aggravating circumstance in the Elizabeth Stallings case. You would so indicate by having your foreperson write "Yes" in the space after this aggravating circumstance on the Issues and Recommendations Form of the Elizabeth Stallings case.

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance and will so indicate by having your foreperson write "No" in that space.

Turning now to the case involving the first degree murder of Deborah Fore. If you find from the evidence beyond a reasonable doubt when Leroy McNeil killed Deborah Fore, Leroy McNeil was taking and carrying away U.S. currency, keys and other items of personal property from the person and presence of Deborah Fore without her consent, by endangering or threatening Deborah Fore with a firearm, specifically a pistol, Leroy McNeil knowing that he was not entitled to take this personal property and intending at that time to deprive Deborah Fore of the use of the property permanently, then you will find this aggravating circumstance and would so indicate by having your foreperson write "Yes" in the space provided after this aggravating circumstance on Issues and Recommendations Form in the Deborah Fore case.

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance and will so indicate by having your foreperson write "No" in that space in the Deborah Fore case.

Only in the Elizabeth Stallings case there is a third aggravating circumstance, third potential aggravating circumstance for your consideration. It reads as follows:

Three, was the murder of Elizabeth Stallings especially heinous, atrocious or cruel?

Again this aggravating circumstance may not be considered in the Deborah Fore case.

Okay. In this context heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. However, it is not enough that this murder of Elizabeth Stallings be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing. This murder must have been a murder without conscience or pitiless crime which was unnecessarily tortuous to the victim, Elizabeth Stallings. If you find from the evidence beyond a reasonable doubt that this murder of Elizabeth Stallings was especially heinous, atrocious or cruel, you would find this aggravating circumstance in that case and would so indicate by having your foreperson write "Yes" in the space after this aggravating circumstance on the Issues and Recommendations Form of Elizabeth Stallings.

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance in the Elizabeth Stallings case and will so indicate by having your foreperson write "No" in that space.

Now if you unanimously find from the evidence, beyond a reasonable doubt, one or more, that one or more of these aggravating circumstances existed in a particular case and have indicated by writing "Yes" in the space after one or more of them on the Issues and Recommendations Form of that particular case. then you would answer Issue One "Yes" in that case.

If you do not unanimously find from the evidence, beyond a reasonable doubt, that at least one of these aggravating circumstances existed and if you have so indicated by writing "No" in the space after every one of the potential aggravating circumstances for that particular case, then you would answer Issue One "No" in that case.

If you answer Issue One "No" in a particular case you would skip Issues Two, Three and you must recommend that this defendant be sentenced to life imprisonment.

If you answer Issue One "Yes" in a particular case then you would consider Issue Two.

Issue Two reads as follows: Do you find from the evidence the existence of one or more of the following mitigating circumstances?

Now in each of the two cases six possible mitigating circumstances are listed on the form. You should consider each of them before answering Issue Two in each case.

A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders. Our law identifies several possible mitigating circumstances. However, in considering issue Two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character or record and any of the circumstances of a particular murder that

the defendant contends is a basis for a sentence less than death and any other circumstances arising from the evidence that you deem to have mitigating value.

The defendant has the burden of proving to you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence taken as a whole must satisfy you, not beyond a reasonable doubt, but simply satisfy you that any mitigating circumstance exists. If the evidence satisfies you that a mitigating circumstance exists, you would find that circumstance; if not, you would not find it. In either event, you would move on to consider the other mitigating circumstances and continue in like manner until you have considered all of the mitigating circumstances listed on the form and any others which you deem to have mitigating value.

Now it is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

First--and this would apply, if at all, in each case. First, consider whether Leroy McNeil has no significant history of prior criminal activity. Significant means important or notable. Whether any history of prior criminal activity is significant is for you to determine from all of the facts and circumstances which you find from the evidence. However, you should not determine whether it is significant only on the basis of the number of convictions, if any, in the defendant's record. Yet you should consider the nature and quality of the defendant's history, if any, in determining whether it is significant. You would find this mitigating circumstance if you find that the defendant Leroy McNeil has only been convicted of voluntary manslaughter and that this is not a significant history of prior criminal activity.

Now the second possible mitigating circumstance, and you will have to, as to this mitigating circumstance, focus on the evidence as related to each of the two cases and such of the evidence that might relate to both of the cases, but you should

consider this potential mitigating circumstance separately in each of the two cases. This potential mitigating circumstance reads as follows:

Consider whether the capacity of Leroy McNeil to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally, or to know that what he is doing at a given time is killing or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing or how wrong it is. Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished. Finally, this mitigating circumstance would exist, even if the defendant did appreciate the criminality of his conduct, if his capacity to conform to the law was impaired, since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it. Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of voluntary intoxication is lessened or diminished because of such voluntary intoxication.

You would find this mitigating circumstance in the case involving the first degree murder of Elizabeth Stallings if you find that Leroy McNeil had drunk a large quantity of intoxicating liquor prior to the killing of Elizabeth Stallings and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

You would find this mitigating circumstance in the case involving the first degree murder of Deborah Fore if you find that Leroy McNeil had drunk a large quantity of intoxicating liquor

prior to the killing of Deborah Fore and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the law.

Now the third possible mitigating factor or circumstance which you should consider is this:

That Leroy McNeil confessed to the crime and did so shortly after the crimes were committed.

Now this would apply, if at all, equally in both cases. If you find from the evidence that the defendant confessed to these crimes and did so shortly after the crimes were committed and that this has mitigating value, then you would find this mitigating circumstance.

Fourth, the defendant Leroy McNeil has an IQ of 78 and is borderline mentally retarded.

This mitigating circumstance would apply, if at all, in both cases. If you find from the evidence, based upon the preponderance of the evidence, that the defendant has an IQ of 78 or a low IQ and is borderline mentally retarded and if you find that this has mitigating value, then you would find this mitigating circumstance.

Fifth, the defendant Leroy McNeil had been a good and useful employee for Rea Construction Company prior to the events of April, 1983. This would apply, if at all, to both of the cases. If you find from the evidence and by the preponderance of the evidence that Leroy McNeil had been a good and useful employee for Rea Construction Company prior to April, 1983, and if you find that this has mitigating value, then you would find this mitigating circumstance.

Six, finally, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value, including any aspect of the defendant's character or reputation or record, or any of the circumstances of this murder which you deem to have mitigating value.

If in a particular case you find one or more mitigating circumstances, then you would answer Issue Two "Yes" for that case. If you do not find at least one mitigating circumstance from the evidence, then you would answer Issue Two "No" in that case. Again, you are to consider each of the cases separately. If you answer Issue Two "Yes," then you must consider Issue Three for that case. If you answer Issue Two "No," in one or both of the cases, then as to the case you answer Issue Three "No"--excuse me, as to the case that you answer Issue Two "No" you would skip Issue Three and answer Issue Four.

Issue Three reads:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

You will consider this issue separately in each case. You will consider it separately in the Elizabeth Stallings case and in the Deborah Fore case. If you find from the evidence one or more mitigating circumstances in one or the other, or both cases, you must weigh the aggravating circumstances found by you in that particular case against the mitigating circumstances found by you in that particular case. In doing so, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance. Then you must weigh the aggravating circumstances of that particular case, so valued, against the mitigating circumstances of that particular case, so valued, and determine whether the mitigating circumstances outweigh the aggravating circumstances.

In each case if you unanimously find beyond a reasonable doubt the mitigating circumstances found by you in that particular case are insufficient to outweigh the aggravating circumstances found by you in that particular case, you would answer Issue Three "Yes" in that case. If you do not so find or

have a reasonable doubt as to whether they do, you would answer Issue Three "No" in that case. If you answer Issue Three "No" in any case, in either of the two cases, as to that case, it would be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer Issue Three "Yes" in a particular case, then it would be your responsibility to consider Issue Four in that particular case.

Issue Four reads as follows:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

If you reach Issue Four in either or both cases, you should consider it separately as to the Stallings case and as to the Fore case. In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you in a particular case. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in that case before you can answer the issue "Yes." In doing so, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstance in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances found by you. After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, then it would be

your duty to answer that issue "Yes" in that particular case. If you are not so satisfied or have a reasonable doubt, then it would be your duty to answer the issue "No" in that particular case.

In the event that you do not find existence of any mitigating circumstances, you must still answer this issue. In such case, you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death penalty. Substantial circumstances may be contrasted with circumstances that are enuous, flimsy, abstract, imaginary, deceptive, or negligible.

Substantial means having substance or weight, important, significant or momentous. Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer Issue Four "Yes" in either case, you must agree unanimously that they are.

If you answer Issue Four "No" in a particular case, you must recommend that this defendant be sentenced to life imprisonment. If you answer Issue Four "Yes" in a particular case, it would be your duty to recommend that the defendant be sentenced to death in that particular case.

Now ladies and gentlemen, I've got just a little bit more instructions, only about a minute or two, but-- and I think there will be time for you to deliberate, at least briefly this afternoon. I'm going to take a recess now until 4:30, at which time I will complete the instructions and let you begin your deliberations.

RECESS.

COURT: Members of the jury, you have heard the evidence and the arguments of counsel for the State and for the defendant. I have not summarized all of the evidence, but it is your duty to recall and to consider all the evidence, whether it's been called to your attention or not. If your recollection of the evidence differs from mine, from the prosecutor, the defense attorney, you are to rely solely upon your recollection of the evidence in your consideration. I have not reviewed all the contentions of the State or of the defendant, but it is your duty to consider not only all the evidence, but also to consider all the arguments, contentions and positions urged by the State's attorneys and by the defendant's attorneys in their final speeches to you, and any other contention that arises from the evidence, whether it's called to your attention or not, and to weigh all this in the light of your common sense, and to make your recommendation as to punishment.

The law, as certainly it should, requires the Presiding Judge to be completely and totally impartial. You are not to draw any inference from any ruling that I have made, or any inflection in my voice or expression on my face, or anything else that I have said or done during this trial, that I either have an opinion or have intimated an opinion as to whether any part of the evidence should be believed or disbelieved, as to whether any of the aggravating or mitigating circumstances has been proved or disproved, or as to what your recommendation in either case ought to find the true facts to be. It is your exclusive providence [sic] to find the true facts of these cases and to make your recommendation reflecting the truth as you find it to be.

Now ladies and gentlemen, when you retire you should select a foreperson. You may select the same foreperson that you selected in the guilt phase; however, you are not obliged to do so. Your decision, your answers to any of the issues as to your final recommendation must be unanimous, all twelve of you agree.

Now when you retire, I'm going to ask that you pass up your copies of the issue sheets to the bailiff. When you first retire please do not begin your deliberations, simply select your foreperson. When you receive the issues and recommendation

as to punishment forms in the two cases, then you may begin your deliberations. When you have answered the forms consistent with the instructions that I have given you and when you have made a recommendation based upon your answers to the issues, your foreperson has answered either all the issues or such answers that are appropriate based upon my instructions in giving your answers to the issues, your foreperson has filled in, dated and signed the recommendation as to punishment in each case, then you will have completed your deliberations.

Now again, if you have questions during the deliberative process, the procedure is for all of you to return to the courtroom and your foreperson ask the question on behalf of the jury.

At this time I'm in a position to excuse the two alternate jurors with my very great thanks for your service in this case. At this time the two alternate jurors are excused. This would complete your jury service. I do not believe that the jury clerk is here this afternoon, so it will not be necessary for you to check out with her, but this will complete your jury service and I thank each of you very much. Thank you.

Okay. Ladies and gentlemen, at this time you may retire and when you receive the issue sheet begin your deliberations. Please give your copies of the issue sheets to the bailiff as you retire to the jury room.

JURY RETIRES. (4:26 P.M.)

COURT: At this proceeding outside the presence of the jury, the Court inquires of the State if the State has any request for additional instructions or any objection to the instructions.

MR. STEPHENS: The State has no request for additional instructions. The State has no objections to the jury instructions.

COURT: The Court inquires of the defendant, if it has requests for additional instructions.

MR. GAMMON: No, Your Honor.

COURT: In light of that, I'm going to give the Recommendations for Punishment Form to the bailiff and ask him to give it to the jury for them to begin their deliberations.

JURY RETURNS. (5:02 P.M.)

COURT: Ladies and gentlemen, having gone over the appointed time yesterday, I think we'll stop on time today. We're going to recess until 9:30 tomorrow morning. During the overnight recess it remains critically important that you not talk to anyone about this case, that you not talk to members of your family about it. It remains critically important that you avoid any media exposure to any aspect. I thank you for your attention throughout the course of the day and particularly thank you for your attention to my instructions to you. At this time take a recess.

RECESS.

Friday, May 11, 1984. (9:30 A.M.)

COURT: Ladies and gentlemen, at this time I would ask that you again retire and continue your deliberations. Thank you very much.

JURY RETIRES.

JURY ABSENT. (10:38 A.M.)

MR. BLACKBURN: We note the jury has now been out for a little more than perhaps an hour and a half, approximately an hour and a half, including that time yesterday. For the record we would like to ask--a reasonable time has been sufficient on the deliberation for life or death and we would ask that you impose a life sentence in this case.

COURT: That motion is denied. Any additional matters at this time?

MR. BLACKBURN: I don't think, Your Honor.

JURY RETURNS. (11:05 A.M.)

COURT: Okay. Ladies and gentlemen, as per your request, take a fifteen minute recess until about twenty-five minutes after 11:00 by the clock on this courtroom. Throughout the time you are deliberating in this case, at any point you wish to take a break, if you will follow the same procedure, additionally when you'd like to take a recess for lunch, if you will follow the same procedure also indicating how long you'd like to recess for lunch. I'd like during this period to sort of let you set your own work schedule.

RECESS.

COURT: Okay. Ladies and gentlemen, if you would, again retire and continue your deliberations.

JURY RETIRES. (11:25 A.M.)

MR. BLACKBURN: Judge, while you're here, let's us go ahead. I guess it's been now, I don't know the exact time, but it's been over two hours I know since the jury went out and for that reason they have obviously been deliberating, starting yesterday afternoon at 4:30, we would make a motion--that a reasonable time has passed, and we would make a motion that you impose a life sentence on Leroy McNeil.

COURT: That motion is denied.

(12:54 P.M.)

JURY ABSENT.

MR. BLACKBURN: Judge, it has now been, I think, around three and a half hours, maybe a little more, three and a half hours since the jury went out to begin deliberating yesterday afternoon at 4:30, not including the break that they have and again we would certainly say enough reasonable time has passed and we would request that you impose life imprisonment.

COURT: Do you wish to be heard?

MR. STEPHENS: No, sir, not yet.

COURT: The motion is denied.

JURY RETURNS. (1:00 o'clock P.M.)

COURT: Okay. Ladies and gentlemen, as per your request, we're going to take a recess for lunch until 2:15 by the clock in this courtroom. During the luncheon recess if some of you are together or all of you were together, again it would not be appropriate for you to talk about this case among yourselves. Please return to the seats that you now occupy at 2:15. Please recall and continue to abide by all the instructions I have given you concerning your conduct as jurors.

RECESS.

COURT: Okay. Ladies and gentlemen, at this time, if you would, retire and continue your deliberations.

JURY RETIRES. (2:17 P.M.)

MR. BLACKBURN: Judge, while you're on the bench, I would renew my motion I made before lunch.

COURT: That is denied.

(3:30 P.M.)

COURT: The jury has requested a break. I will hear your motion first.

MR. BLACKBURN: Thank you, Your Honor. Judge, by my calculations it's been approximately now four hours and forty-five minutes since they began deliberating yesterday afternoon and again we would renew our motion and ask that certainly sufficient time has passed and move again that a reasonable time has passed and that the life sentence be imposed.

COURT: Again that is denied.

JURY RETURNS.

COURT: Ladies and gentlemen, it's my understanding at this time you'd like a ten minute break. We'll take a recess until 4:00 o'clock by the clock in this courtroom.

RECESS.

COURT: Ladies and gentlemen, before you resume your deliberations, I want to go over a couple of matters with the foreperson of the jury. Now as I indicated in my instructions to you, of course your answers to each of the issues in each case must be unanimous in your recommendation in each case. It must be a unanimous recommendation. Now I'm going to ask the foreperson of the jury some questions. Please listen very carefully to the question I ask. Let me fully complete the question before you answer it and only answer the very specific question that I ask. In the case State of North Carolina versus Leroy McNeil, involving the first degree murder of Elizabeth Faye Stallings, have you in your deliberations in that case reached Issue Number Four? Please answer yes or no.

FOREMAN: No.

COURT: In your deliberations in the case involving State of North Carolina versus Leroy McNeil, involving the first degree murder of Deborah Fore, in your deliberations in that case have you reached Issue Number Four, yes or no?

FOREPERSON: No.

COURT: Okay.

MR. STEPHENS: Judge, can we approach the bench?

COURT: Yes.

When I indicate that you have reached Issue Number Four, I do not mean if you have decided unanimously your answer to Issue Number Four. What I mean have you unanimously decided such other issues that you are not considering Issue Number Four. Would that explanation change your answer to either case?

FOREMAN: No, sir, it would not.

JURY RETIRES. (4:49 P.M.)

MR. BLACKBURN: Judge, if I could please, I would like for the record to renew my motion.

COURT: That is denied.

(4:54 P.M.)

COURT: Court will be back in session.

MR. BLACKBURN: Thank you, Judge. Judge, as you know, we have made a motion several times prior to this time concerning the fact we believe a reasonable time has passed and life sentence should be imposed. We have now reached almost the end of the workday. They have been out all day long, except for lunch and breaks, and I believe, and of course, they went out yesterday afternoon at 4:30. I don't know precisely how much time is necessary to reach a decision, but I do know that I think sufficient time has passed now. A reasonable time has passed with the questions to be determined by the jury as to life and death and that as time goes by, it becomes increasingly difficult for the

jury to reach its decision. One of the reasons I want to make the motion now as strongly as I can is because I recognize that it may be possible, may be necessary if you deny my motion that the jury recess over the weekend and come back on Monday morning. If that should occur, that bothers me because, of course, this has been a highly publicized trial, as you know. It's in the newspapers constantly. It's on the radio constantly. It's on the television news constantly. Having watched some of that television news, I know as recently as last night matters not permitted before the jury in this case have come to the public's attention. There's such a great risk that prejudice could come to Mr. McNeil in these two cases if the matter was not simply stopped at this point, because of the great danger over the weekend, additional publicity. If they find out, for example, he's been charged with a third crime, though not proved, that could be the sort of thing to tip the case one way or the other, though we would never know it, and this jury has had somewhere over six hours, or approximately six hours to deliberate, which I think is plenty of time for them to make a decision, if, in fact, they were going to make a decision. For that reason, I would urge, particularly at this time, as strongly as possible that you strongly consider imposing a life sentence.

COURT: Thank you, Mr. Blackburn. Mr. Stephens, do you wish to be heard?

MR. STEPHENS: No, sir.

COURT: The defendant's motion is denied. Mr. Sheriff, if you would, ask the jurors to come out.

JURY RETURNS. (5:02 P.M.)

Ladies and gentlemen, it's approximately 5:00 o'clock. In just a moment I'm going to ask that you go back into your jury deliberation room and I'm going to let you determine basically one of two options. If you would like to continue your deliberations today for some additional period after 5:00 o'clock, with the understanding that at whatever time you would like as a group to stop for the day, you would just need to send me a note and do

so; then that would be one of your options. The other option would be that we just go ahead and recess at the normal time to recess and that you would return at 9:30 Monday morning to continue your deliberations. If you wanted to continue your deliberations, at such time as you wanted to stop for the day, then again you would come back at 9:30 on Monday morning and continue your deliberations. What I would like for you to do at this time is to go back and make that determination. Then if you would give the bailiff a note as you have previously as to which of the two options you would prefer, and it does not make a bit of difference to me, it's whichever option you would prefer, then your wishes will be complied with and either continue deliberations until you indicate that you are ready to stop or I'll bring you out and with some additional instructions we'll recess for the weekend. Thank you very much.

JURY RETIRES.

JURY RETURNS. (5:05 P.M.)

COURT: Okay. Ladies and gentlemen, consistent with your request, we're going to recess at this time until Monday morning. One thing that I did not think about originally, normally on Mondays Court begins at 10:00 o'clock and there will be on Monday a fairly large number of people who will be planning to come to the courtroom for other purposes at 10:00 o'clock and it might create some confusion if we started this matter at 9:30. With your permission, we'll recess until 10:00 o'clock on Monday morning. When you return on Monday there will probably be a significant number of people here in the courtroom. They will be here on matters unrelated to this case and you will begin your deliberations before we begin any other business. If you would return to the seats you now occupy at 10:00 o'clock on Monday morning, at that time you will continue your deliberations. Now before you leave today, I want to take just a moment to emphasize something that I have talked about a number of times in the course of this trial, but I think it's so important that with your indulgence I'm going to just take an additional moment to talk about it. This case has received and will receive over the weekend a significant amount of coverage in the local media, in the newspapers, on the radio, on television. It is of the utmost

importance that you not expose yourself to any of that. I can not emphasize that too strongly. I'm going to ask each of you to make a very very special effort to not inadvertently be exposed to any newspaper, radio, or television coverage of this trial. I know that none of you would intentionally do that, but what I'm trying to emphasize is that it will be difficult, it's going to take a special effort. I'm going to ask that you not look at any local television news programs over the weekend, do not read any newspaper over the weekend, do not listen to the radio over the weekend. I'm asking you to take these very special precautions in lieu of the alternative, which would be to sequester you over the weekend. I know none of you would want that and I wouldn't want to do that, but to avoid that, I'm going to ask that you make this special effort in not reading any newspapers, not listening to the radio and not watching any television news program. Additionally, all of the other instructions that I have given you previously, of course, still apply. It would not be appropriate for any of you to talk about any aspect of this case among yourselves over the weekend. I again particularly emphasize that you not talk to any members of your family about this case and I recognize the very special temptation or inclination that there may be to do that. So I ask you with all the fervor that I can that you not do that. I thank each of you for your conscientious effort in this trial and to these deliberations to this point. At this time we'll take a recess until 10:00 o'clock Monday morning. Please return to the seats that you now occupy at that time and then your deliberations in this case will continue.

COURT: Ladies and gentlemen of the jury, if you would again, retire and continue your deliberations.

JURY RETIRES TO CONTINUE DELIBERATIONS AT 10:05 A.M.

JURY KNOCKS ON DOOR AT 10:26 A.M.

JURY RETURNS TO JURY BOX

COURT: Ladies and gentlemen, at this time I am informed that the jury has decisions in both cases in the case of the State of North Carolina, versus, Leroy McNeil. At this time, anyone who -- I'm going to excuse everyone who is not connected with the Leroy McNeil case, until fifteen minutes until eleven by the clock in this courtroom. If you are not here, either connected with the Leroy McNeil case or as a spectator in that case, or if you are here for other business, you are excused at this time until fifteen minutes until eleven.

COURT: Bring the defendant in.

DEFENDANT ENTERS COURTROOM

COURT: Mister sheriff, if you will ask the jurors to come out and take the seats they occupied during the trial.

JURY RETURNS TO JURY BOX

COURT: Ladies and gentlemen, if in each of the two cases you have unanimously answered each of the issues or such of the issues as constitute a recommendation, and have made a recommendation in each of the two cases based upon your unanimous answers to the issues and you have unanimously made a recommendation; and if the foreperson of the jury has filled in, dated and signed each of the two issues and recommendations on the forms, then I would ask the foreperson of the jury to please hand the issues and recommendation forms to the bailiff, who will hand it to the Court.

(NOTE: Request of Court complied with.)

COURT: The foreperson of the jury will please stand.

CLERK: Ladies and gentlemen of the jury, you have returned the following answers to the issues and recommendation as to punishment. State of North Carolina versus Leroy McNeil, case of Elizabeth Faye Stallings, you have answered Issue No. 1, do you unanimously find the evidence beyond a reasonable doubt the existence of one or more of the following aggravating cir-

cumstances; answer, yes, had Leroy McNeil been previously convicted of a felony involving the use of violence to the person; answer, yes; was this murder committed while Leroy McNeil was engaged in the commission of robbery with a firearm; answer, yes; was this murder especially heinous, atrocious or cruel; answer, yes. You have answered the second issue, do you find from the evidence the existence of one or more of the following mitigating circumstances; answer, yes. You have answered the third issue, do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is or are insufficient to outweigh the aggravating circumstance or circumstances found by you; answer, yes. Issue Four, do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is or are sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you, answer, yes.

Your recommendation as to punishment. We the jury unanimously recommend that the defendant Leroy McNeil, be sentenced to death; this the 14th day of May 1984; signed Michael S. Hodges, Foreman of the Jury.

Are these your answers and is this your recommendation.

FOREMAN: Yes it is.

CLERK: So say you all?

JURORS: "Yes."

CLERK: You have answered the issues and recommendation as to the punishment in the case of State of North Carolina versus Leroy McNeil in the case of Deborah Jean Four. Issue No. 1, do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances; answer, yes, had Leroy McNeil been previously convicted of a felony involving the use of violence to the person; answer, yes; two, was this murder committed while Leroy McNeil was engaged in the commission of robbery with a

firearm; answer, yes. Issue 2, do you find from the evidence the existence of one or more of the following mitigating circumstances; answer, yes. Issue 3, do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is or are insufficient to outweigh the aggravating circumstance or circumstances found by you; answer, yes. Issue 4, do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is or are sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you, answer, yes.

Your recommendation as to punishment. We the jury unanimously recommend that the defendant, Leroy McNeil, be sentenced to death; this the 14th day of May 1984; signed, Michael S. Hodges, Foreman of the Jury.

These are your answers and recommendation so say you all?

JURORS: "Yes."

COURT: Thank you. Any motions requiring continued presence of the jury?

STATE OF NORTH CAROLINA File 83-CRS-25605
Film #
COUNTY OF WAKE In the General Court of Justice
Superior Court Division

STATE OF NORTH CAROLINA

VS ISSUES AND RECOMMENDATION AS TO PUNISHMENT

LEROY McNEIL (Deborah Jean Fore case)

ISSUE ONE:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER: Yes

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE, "NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE ONE.

(1) Had Leroy McNeil been previously convicted of a felony involving the use of violence to the person?

ANSWER: Yes

(2) Was this murder committed while Leroy McNeil was engaged in the commission of robbery with a firearm?

ANSWER: Yes

ISSUE TWO:

Do you find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER: Yes

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. YOU NEED NOT INDICATE ON THIS FORM WHICH MITIGATING CIRCUMSTANCES YOU DO OR DO NOT FIND.

IF YOU FIND ONE OR MORE OF THE MITIGATING CIRCUMSTANCES FROM THE EVIDENCE WRITE, "YES," IN THE SPACE AFTER ISSUE TWO, ABOVE. IF YOU DO NOT FIND ANY MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THAT SPACE.

1. The defendant Leroy McNeil has no significant history of prior criminal activity.

2. The capacity of Leroy McNeil to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

3. That Leroy McNeil confessed to the crime and did so shortly after the crime was committed.

4. That Leroy McNeil has an I.Q. of 78 and is borderline mentally retarded.

5. The defendant Leroy McNeil had been a good and useful employee for Rea Construction Company prior to the events of April, 1983.

6. Any other circumstances arising from the evidence which you the jury deem to have mitigating value.

ISSUE THREE:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER: Yes

IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES," PROCEED TO ISSUE FOUR.

ISSUE FOUR:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER: Yes

IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWER ISSUE FOUR "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONMENT" OR "DEATH," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, Leroy McNeil be sentenced to Death.

This the 14th day of May 1984.

/s/ Michael S. Hodges (Signature)
Foreman of the Jury

STATE OF NORTH CAROLINA File 83-CRS-25606
Film #
COUNTY OF WAKE In the General Court of Justice
Superior Court Division

STATE OF NORTH CAROLINA

VS ISSUES AND RECOMMENDATION AS TO PUNISHMENT

LEROY McNEIL (Elizabeth Faye Stallings case)

ISSUE ONE:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER: Yes

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE, "NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE ONE.

(1) Had Leroy McNeil been previously convicted of a felony involving the use of violence to the person?

ANSWER: Yes

(2) Was this murder committed while Leroy McNeil was engaged in the commission of robbery with a firearm?

ANSWER: Yes

(3) Was this murder especially heinous, atrocious or cruel?

ANSWER: Yes

ISSUE TWO:

Do you find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER: Yes

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. YOU NEED NOT INDICATE ON THIS FORM WHICH MITIGATING CIRCUMSTANCES YOU DO OR DO NOT FIND.

IF YOU FIND ONE OR MORE OF THE MITIGATING CIRCUMSTANCES FROM THE EVIDENCE WRITE, "YES," IN THE SPACE AFTER ISSUE TWO, ABOVE. IF YOU DO NOT FIND ANY MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THAT SPACE.

1. The defendant Leroy McNeil has no significant history of prior criminal activity.

2. The capacity of Leroy McNeil to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

3. That Leroy McNeil confessed to the crime and did so shortly after the crimes were committed.

4. That Leroy McNeil has an I.Q. of 78 and is borderline mentally retarded.

5. The defendant Leroy McNeil had been a good and useful employee for Rea Construction Company prior to the events of April, 1983.

6. Any other circumstances arising from the evidence which you the jury deem to have mitigating value.

ISSUE THREE:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER: Yes

IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES," PROCEED TO ISSUE FOUR.

ISSUE FOUR:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER: Yes

IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWER ISSUE FOUR "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONMENT" OR "DEATH," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, Leroy McNeil be sentenced to Death.

This the 14th day of May 1984.

/s/Michael S. Hodges (Signature)
Foreman of the Jury

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 90-968

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

STATE OF NORTH CAROLINA,

Petitioner,

v.

LEROY McNEIL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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COUNSEL FOR RESPONDENT

QUESTION PRESENTED

DID THE SENTENCING INSTRUCTIONS CREATE A REASONABLE LIKELIHOOD THAT THE SENTENCING JURY BELIEVED INDIVIDUAL JURORS COULD NOT WEIGH AND CONSIDER MITIGATING EVIDENCE NOT FOUND BY THE JURY AS A GROUP TO SUPPORT A MITIGATING FACTOR?

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NO. 90-968

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

STATE OF NORTH CAROLINA,

Petitioner,

v.

LEROY McNEIL,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Respondent, Leroy McNeil, respectfully opposes and requests this Court to deny the Petition for Writ of Certiorari filed by petitioner seeking review of the decision by the Supreme Court of North Carolina. *See State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990).

OPINION BELOW

JURISDICTION

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS

STATEMENT OF THE CASE

Pursuant to Rules 15.2 and 24.2, these items are omitted since respondent is satisfied with petitioner's statements of the OPINION BELOW, JURISDICTION, CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS, AND STATEMENT OF THE CASE.

REASONS WHY A WRIT SHOULD NOT ISSUE

A reasonable likelihood exists that respondent's capital sentencing jury applied the trial court's instructions in a way that prevented the consideration of constitutionally relevant mitigating evidence. *Boyde v. California*, 494 U.S. ____, ____, 108 L.Ed.2d 316, 329 (1990). In dutifully performing its review of this case after this Court remanded it for reconsideration, *see McNeil v. North Carolina*, 494 U.S. ____, 108 L.Ed.2d 756 (1990), the lower court painstakingly applied the relevant decisions of this Court to "conclude that when viewed in the context of the overall charge, there is a reasonable likelihood that the jury interpreted the instructions here to require unanimity as to mitigating circumstance." *State v. McNeil*, 327 N.C. 388, 393, 395 S.E.2d 106, 110 (1990) (relying upon *Boyde v. California*, 494 U.S. ____, 108 L.Ed.2d 316 (1990); *McKoy v. North Carolina*, 494 U.S. ____, 108 L.Ed.2d 369 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988)). Petitioner does not and, indeed, cannot contend that the lower court failed to

apply the appropriate constitutional standards as interpreted by the prevailing decisions of this Court. Rather, petitioner merely disagrees with the lower court's fact-bound assessment of how a reasonable North Carolina jury would have understood these particular sentencing instructions. Petitioner presents no significant question of constitutional importance either to capital punishment jurisprudence generally or to North Carolina's capital punishment practices specifically. As petitioner acknowledges, the instructions given here were not the same as the pattern instructions given in *McKoy* or the new post-*McKoy* instructions. There being no significant issue worthy of this Court's review, the petition should be denied.

A. Respondent's Jury Likely Understood the Instructions to Require Unanimous Agreement on Mitigating Factors.

As this Cocurt knows, "in North Carolina's system, *each juror* must be allowed to consider all mitigating evidence in deciding issues Three and Four. . . ." *McKoy*, 494 U.S. at ____, 108 L.Ed.2d at 381 (emphasis added). Furthermore, the Eighth Amendment forbids instructions that a juror may reasonably interpret as requiring the entire jury to agree a mitigating circumstance exists before that circumstance may be considered for the purpose of sentencing. *Mills*, 486 U.S. at 376-78. *Mills* did not turn on the sentencing jury being told it had to agree unanimously a mitigating factor existed in order to find it. Rather, *Mills* hinged on the operation of the jury instructions, taken as a whole, in precluding any juror from considering evidence of a mitigating factor in her ultimate sentencing decision if that factor was not found by the jury as a whole. *Id.* at 384. In this case, the lower court properly concluded, applying the *Boyde* standard, that the instructions given at the close of respondent's sentencing hearing, taken as a whole, were reasonably likely to have been understood to require the jury to agree

unanimously that a mitigating circumstance had been proved before any juror could consider such mitigating evidence in the ultimate sentencing decision.

Unlike the procedures in many state capital punishment schemes, *see, e.g., Commonwealth v. Frey,* 520 Pa. 338, 347, 554 A.2d 27, 31 (1989) (Pennsylvania has no step in process where jury must find mitigating factors). *State v. Thompson*, 768 S.W.2d 239, 250-51 (Tenn. 1989) (Tennessee has no step like North Carolina's Issue Two), North Carolina has a step in its sentencing procedure where the jury is told to make findings as to whether specific mitigating factors have been proved by a defendant. Respondent's jury was told in Issue Two to determine whether one or more of five specific mitigating factors (as well as any other unspecified factors) had been proved. Appendix to Petition at A-48, A-49, A-52, A-53. Although the word "unanimously" does not appear in Issue Two, the trial court's final mandate to the sentencing jury stated, "Your decision, your answers to any of the issues as to your final recommendation must be unanimous, all twelve of you agree." Appendix to Petition at A-34. Respondent's jury would likely have understood this directive as requiring unanimous agreement as to the existence of mitigating circumstances. Had this mandate existed in isolation and not been underscored by subsequent instructions, its effect on the validity of respondent's death sentences might have been less obvious but no less unconstitutional. *E.g., Commonwealth v. Billa,* 521 Pa. 166, 555 A.2d 835 (1989) (finding one isolated mention of unanimity in the sentencing mandate violated *Mills*). But the trial court underscored this requirement of unanimity and applied it to every issue in the case through supplemental instructions at two points during the jury's sentencing deliberations. Appendix to Petition at A-39, A-40. Petitioner argues that "close scrutiny of the supplemental instructions in context shows that the court did not imply unanimity was required on Issue Two as to mitigating circumstances." Petition at 18. Unfortunately, respondent's jury did not have a written version of these instructions. It

did not have the opportunity to scrutinize carefully or parse through them for subtle shades of meaning. Respondent's jury could only apply "a common sense understanding of the instructions in light of all that [had] taken place at the trial . . . ." *Boyde*, 494 U.S. at ____, 108 L.Ed.2d at 329. It could not have engaged in "technical hairsplitting" by closely scrutinizing and "parsing instructions for subtle shades of meaning in the way lawyers might." *Id.* Hearing the instructions, there is a reasonable likelihood the jury would have understood them to apply to the consideration of mitigation at Issue Two. *Id.*

Furthermore, the only method for reaching any decision given to respondent's jury required a unanimous determination. Appendix to Petition at A-18, A-22, A-23, A-27, A-31, A-32, A-34. The Issues and Recommendation as to Punishment forms also contained the unanimity requirement for these determinations. *Id.* at A-47 to A-54. The instructions and verdict forms used in the guilt phase also told the jury to be unanimous in its decisions. Respondent's jury heard nothing at any point in the proceedings other than its decisions had to be unanimous. A North Carolina jury will understand its decisions must be unanimous, to the extent that "a judge is not even required to charge the jury in general about the need for a unanimous verdict . . . ." *State v. Sturdivant,* 304 N.C. 293, 305, 283 S.E.2d 719, 728 (1981). Any suggestion to the contrary is counter-intuitive.

This precise common sense understanding would cause respondent's jury, acting reasonably, to understand the instructions as requiring it to reach unanimous agreement before finding the existence of mitigation. This understanding was deemed "a settled principle" by the lower court long before respondent's trial. *State v. Kirkley,* 308 N.C. 196, 218, 302 S.E.2d 144, 157 (1983), *overruled on other grounds, State v. Shank,* 322 N.C. 243, 367 S.E.2d 639 (1988). Petitioner's hyper-technical reading of the instructions does

not dispel the lower court's conclusion that the jury's common sense understanding, coupled with the trial court's repeated references to unanimous determinations in its mandate and supplemental instructions, would not have led it to believe that a unanimous determination was required before a mitigating circumstance could be considered.

The North Carolina Supreme Court faithfully applied *Boyd*, *McKoy*, and *Mills*. Furthermore, its intimate familiarity with the instructions in question and with the nature and character of North Carolina jurors endows it with particular expertise in assessing how reasonable jurors would have understood these instructions in context. Its view is entitled to considerable deference in this limited situation. Accordingly, this case is wholly inappropriate for this Court's review.

B. The Instructions Provide No Method For Individualized Consideration of Mitigating Evidence.

From its analysis that respondent's jury could not reasonably have felt it had to agree unanimously to find a mitigating factor, petitioner leaps to the conclusion that the jury would have understood the instructions to allow individual jurors to weigh and consider any mitigating factors each individual juror found. Petition at 17-18. Nothing in the record, in logic, or in common sense supports this assertion. In truth, the instructions did not even hint that individual jurors remained free to consider mitigating evidence not found by the jury to support a mitigating circumstance in Issue Two. *Mills* recognized the illogic of this argument. "No instruction was given indicating what the jury should do if some but not all of the jurors were willing to recognize something about petitioner, his background, or the circumstances of the crime, as a mitigating factor." 486 U.S. at 379. Petitioner's new interpretation of this sentencing procedure

simply "appears out of the blue." *Mills v. State,* 310 Md. 33, 94, 527 A.2d 22, 33 (1987) (McAuliffe, J., dissenting), *rev'd,* 486 U.S. 367 (1988).

Common sense dictates that a jury assumes its decisions are to be made as a group, not individually, unless explicitly instructed otherwise. Jurors ordinarily do not make individual decisions in civil or criminal cases; verdicts are not rendered on an individual basis. As the North Carolina Supreme Court was keenly aware, when the *Kirkley* jury asked its question regarding whether it needed to be unanimous with respect to mitigation, it assumed that the jury as a group had to determine each mitigating circumstance. This assumption comports with reason and common sense. There is no basis for believing respondent's jury saw these instructions in a completely different way. Indeed, the revisions of the pattern jury instructions underscore the ambiguity in the use of the pronoun "you" in respondent's instructions. An individual juror may now weigh mitigation she finds supported by the evidence. To articulate this point clearly, the revised instructions refer to such individual determinations as those "that the juror" finds or "found by one or more of you." N.C.P.I. -- Crim. 150.10 at 34-35 (March 1990). The revised pattern instructions change or modify "you" to remove the ambiguity in instructions like those in this case and show the pronoun's singular use.

The weakness of petitioner's position is illustrated by the changes made in the North Carolina Pattern Jury Instructions for capital cases, promulgated in light of *McKoy*. When considering Issue Three, a capital jury is now told:

> If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. When deciding this issue, each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in Issue II.

N.C.P.I. -- Crim. 150.10 at 34 (March 1990). Similarly, with respect to Issue Four, the jury is told to consider "the mitigating circumstance or circumstances found by one or more of you." *Id.* at 35. The instructions concerning Issue Four are noteworthy.

> In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances *found by one or more of you. When making this comparison, each juror may examine any mitigating circumstance or circumstances that juror determined to exist by a preponderance of the evidence.* After considering the totality of the aggravating and mitigating circumstances, each of you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue "Yes." In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. You may very properly give more weight to one circumstance than another. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances. After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty when considered with the mitigating circumstances *found by one or more of you*, it would be your duty to answer the issue "Yes." If you are not so satisfied or have a reasonable doubt, it would be your duty to answer the issue "No."

Id. at 35-36 (emphasis added). These changes in the pattern instructions provide an "additional bit of evidence about the natural interpretation of" the instructions and sentencing forms used by respondent's jury. *Mills*, 486 U.S. at 381.

> Although we are hesitant to infer too much about the prior verdict form from the Court of Appeals' well-meant efforts to remove ambiguity from the State's capital-sentencing scheme, we cannot avoid noticing the significant changes effected in instructions to the jury. We can and do infer from these changes at least *some* concern on the part of that court that juries could misunderstand the previous instructions as to unanimity and the consideration of mitigating evidence by individual jurors.

Id. at 382.

The revisions are also significant because they align North Carolina with other jurisdictions that seek to avoid any unconstitutionality by expressly allowing an individual juror to consider any mitigating evidence that she credits in her ultimate sentencing decision. It is illogical to think that respondent's jury would have understood the sentencing procedure allowed such individual consideration at Issue Three and Issue Four without any directions in the instructions to do so.

The only analysis petitioner offers rests on its interpretation of "you." According to petitioner, since this pronoun may be used individually or collectively, respondent's jury would have understood the instructions at Issue Three and Issue Four concerning mitigating circumstances "found by you" to mean "found by an individual juror," while the identical language, when applied to aggravating circumstances, would refer to the unanimous jury. Petition at 19. The lower court, applying *Boyde*, found a reasonable likelihood the jury would have understood the instructions in a different, unconstitutional way. *McNeil*, 327 N.C. at 393, 395 S.E.2d at 109-10; *see Boyde*, 494 U.S. at ____, 108 L.Ed.2d at 329. Its application of *Boyde* cannot be questioned simply by hypothesizing a plausible, constitutional interpretation. Rather, the constitutional interpretation must be the only reasonably likely one the jury could have gleaned from the instructions. *Id.*

Petitioner also argues the use of the pronoun "you" could be understood in its singular form. The use of the pronoun "you" is sufficiently ambiguous that respondent's jury reasonably understood it as referring to the jury as a whole. Significantly, the trial court never used the pronoun "you" to refer to individual jurors. The jury was impaneled with this pronoun used collectively; the trial court began his sentencing instructions using this pronoun collectively; the trial court addressed the jury collectively with this pronoun during its deliberations; and the trial court used the

pronoun collectively to frame each of the four sentencing issues. It used the pronoun "you" in this same, plural fashion throughout the trial, the instructions, and the penalty-phase issues.[1] The more plausible interpretation of the word "you" in Issue Two is its plural form.

The plausibility of the jury understanding the trial court using the pronoun "you" in its plural form is dramatically illustrated by the phraseology of the "catch-all" mitigating circumstance. *See* N.C. Gen. Stat. § 15A-2000(f)(9) (requiring the consideration of any additional mitigating factors found by the jury). When the trial court presented this option to respondent's jury on the issue sheets, it read: "Any other circumstances arising from the evidence which *you the jury* deem to have mitigating value." Appendix to Petition at A-49, A-53 (emphasis added). Thus, this written directive, the only instruction the jury had before it during the deliberations, plainly used "you" in its plural form to refer to all the jurors as a group.

Additionally, Issue Three and Issue Four in this case direct the jury to consider only mitigating circumstances "found by you." This language, identical to the language used to allow consideration of aggravating circumstances at Issue Three and Issue Four, plainly contemplates the jury making a group determination as to the existence of mitigating circumstances. A similar flaw existed in the Maryland procedure. The consideration of mitigation in the balancing stage was limited to those circumstances

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[1] Interpreting the meaning of the pronoun "you" by reference to its general use in the trial court's instructions follows general axioms of language construction. Analogously, well-settled notions of statutory construction direct that any ambiguity as to the meaning of a word used several times is resolved by assuming it means the same thing throughout the statute. 2A Sutherland, Statutes and Statutory Construction § 46.16 at 161 (Sands 4th ed. 1984); *see Kifer v. Liberty Mutual Insurance Co.*, 777 F.2d 1325 (8th Cir. 1985); *Boriack v. Boriack*, 541 S.W.2d 237 (Tex. Civ. App. 1976). "[T]here is nothing in the context which suggests the necessity for a departure from the ordinary rule of construction requiring that the same meaning shall be given to a term whenever used in the same act . . . ." *Wells v. Housing Authority of Wilmington*, 213 N.C. 744, 751, 197 S.E. 693, 697-98 (1938). If the trial court had intended to use the pronoun "you" in its singular sense, it would have said so. Since it did not, one must assume he intended it to be taken as a collective reference to the jury as a whole.

marked in a particular fashion at an earlier step. "Any mitigating circumstance not so marked, even if not unanimously rejected, could not be considered by any juror." *Mills*, 486 U.S. at 380. That earlier determination "would prevent those jurors who thought [particular evidence] was relevant to the ultimate sentencing decision from giving that mitigating circumstance any weight." *Id.* at 380 n.14.

In summary, respondent's jury is reasonably likely to have understood the sentencing procedure as requiring it to agree unanimously before a mitigating circumstance could be found and considered. At the very least, it would have understood that the jury as a whole needed to find a mitigating circumstance before that circumstance (and any evidence supporting it) could be considered by a juror in her ultimate sentencing decision.

C. No Split of Authority Exists Among the Jurisdictions on this Question.

As a final plea for review by this Court, petitioner claims various courts have applied *Mills* and *McKoy* in a fashion inconsistent with the court below. Petition at 19-22. In doing so, petitioner ignores the great dissimilarities among the applicable state capital punishment schemes. Most, if not all, of those jurisdictions have no step in this capital sentencing procedures analogous to Issue Two in North Carolina. Pennsylvania does not require a capital sentencing jury to determine the existence of mitigating circumstances. *Commonwealth v. Carpenter*, 511 Pa. 429, 444, 515 A.2d 531, 539 (1986). Since findings similar to North Carolina's Issue Two are not required, a Pennsylvania jury cannot be misled into believing unanimity is required to find mitigation. *Commonwealth v. Frey*, 520 Pa. 338, 347, 554 A.2d 27, 31 (1989). The state's reliance on *Frey*, therefore, is grossly misplaced.

Additionally, in Colorado, only two issues are submitted to the sentencing jury and neither requires the jury to determine whether mitigating factors have been proved. The jury is explicitly instructed to consider all mitigating evidence in the sentencing decision. *See People v. Rodriquez*, 794 P.2d 965 (Colo. 1990); *People v. Davis*, 794 P.2d 159 (1990). Neither of these cases are inconsistent or in conflict with the court below regarding either *Mills* or *McKoy*.

Similarly, the instructions used in South Carolina have no step similar to Issue Two. No findings of mitigating circumstances are required. Trial Transcript at 1441-57, *State v. Patterson*, 384 S.E.2d 699 (S.C. 1989).[2] In *Patterson*, the trial court "clearly charged the jury it could consider any mitigating factor and could recommend life for no reason at all. Nothing in the charge insinuate[d] life could be given only upon a unanimous finding of a mitigating circumstance." 384 S.E.2d at 703. Furthermore, Patterson's jury received explicit instructions that individual jurors could consider any statutory or non-statutory mitigating circumstances supported by the evidence in their deliberations. Trial Transcript at 1459, *id*; *accord State v. Green*, 392 S.E.2d 157 (S.C. 1990).

Petitioner also curiously relies upon cases from New Mexico to suggest a split among the jurisdictions. Petition at 21. New Mexico uses a pattern jury instruction that does not require a jury to make findings about mitigating circumstances. It provides: "If you find an aggravating circumstance, you must consider all mitigating circumstances." *State v. Clark*, 772 P.2d 322, 343 (N.M.), *cert. denied*, 110 S.Ct. 291 (1989). Obviously, such language allows the full consideration of mitigation by individual jurors. A New Mexico capital jury, unlike respondent's jury, is not required to make "findings" in mitigation. The state's reference to *Clark* is very misleading.

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[2] A copy of the sentencing phase jury instructions in *Patterson* is attached hereto in the Appendix.

Likewise, petitioner's reference to a federal district court decision from the Sixth Circuit is of no moment. The decision involved a capital sentencing from Kentucky and no step like North Carolina's Issue Two is used. *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1108-09 & n.7 (6th Cir. 1990) (*en banc*); *see* K.R.S. § 532.025(3).

Petitioner also asserts a division based upon cases from Alabama and Missouri. Petition at 20-21. In Alabama, however, the jury could not understand ambiguous instructions to require unanimous agreement on mitigation not only because the jury does not find these factors, but also because the jury verdict itself need not be unanimous. *See Ex parte Martin*, 568 So.2d 496 (Ala. Cr. App.), *cert. denied*, 110 S.Ct. 419 (1989). Furthermore, the jury's sentencing recommendation is merely advisory; the judge imposes the punishment. *Id.* Missouri is also unlike North Carolina. The sentencing jury is instructed it may return a life sentence for any reason at all. Jurors are also told "you must consider *all* circumstances in deciding whether to assess and declare the punishment is death." *State v. Petary*, 790 S.W.2d 243, 244-45 (Mo. Banc), *cert. denied*, ____ U.S. ____, 112 L.Ed.2d 426 (1990).

This review of the purported "conflict" between *McNeil* and the decisions of other jurisdictions demonstrates it is illusory and non-existent. Furthermore, it illustrates the unworthiness of this case for review by certiorari. The capital punishment schemes are vastly different and the sentencing instructions involved are not sufficiently similar to warrant this Court's review. The state simply fails to recognize how the disparity in the sentencing procedures, particularly where the jury as a unit never required to find specific mitigating factors, calls for varying applications of *Mills* and *McKoy*. Quite simply, there is no conflict that calls for this Court's resolution.

CONCLUSION

For the reasons stated herein, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

This the 1st day of March, 1991.

Respectfully submitted,

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what Dot Shealy retyped during the lunch break. I will leave it right here on the desk.

You gentlemen both have done your duties I think exceptionally -- you have done all you could. You have done a good job, both sides. When you do that, that's all anybody can do.

(The following takes place after the recess and before the jury is returned to the courtroom.)

THE COURT: Let me ask, for the record, have you looked over the forms, the statutory instructions?

MR. DELGADO: Yes, sir.

THE COURT: Let me ask just for housecleaning, did you give your requests to charge to them?

MR. MYERS: Yes, sir.

THE COURT: Bring the jury back.

(The jury is returned to the courtroom.)

THE COURT: Madam Foreman and members of the jury, under the Constitution and laws of South Carolina, you are the finde of the facts in this case. I do not have the right to pass upon the facts or even to express any opinion I might have as to them, nor may I intimate in any way what I may think about the guilt or innocence of the defendant. You are also the judges and the sole judges of the credibility, the believa bility of the witnesses who have testified in this case. In passing upon their credidibility you may take into considera- tion many things, such as - one, the demeanor or manner of

testifying; two, whether a witness has reason to be biased or prejudiced; three, whether a witness's testimony was contradicted on the one hand or supported and corroborated on the other hand. You certainly do not determine the credibility or believability by counting the number of witnesses for either side. You may believe a small portion of a witness's testimony and disregard the larger or vice versa. You may believe one witness against many or many against one. All these things you will consider, bearing in mind that you should give the defendant the benefit of every reasonable doubt.

Now by the same Constitution and law which makes you the finders of facts and evidence as I have discussed with you, I am, as the judge, made the sole and only instructor in the law. You must accept as correct the law which I charge you and to apply it to the evidence as you find it and reach your verdict. In this case today you must accept the law as I charge it to you. I charge you in this regard that neither or I should be concerned about what the law ought to be, but only what I charge you the law to be.

Madam Forelady and members of the jury, it now becomes your duty to decide what sentence this Court will impose on the defendant, Raymond Patterson, Jr. There are two sentences or verdicts you are to consider in this case. One is the death penalty, which in this State is by electrocution;

and the other is life imprisonment. The order in which I explain these two sentences is in no way a recommendation by this Court as to which sentence you should consider -- excuse me, which sentence you should recommend. It is simply that one must be stated first. Also remember that, although I use the term, recommend, the defendant will actually be sentenced to whatever is recommended by you.

First, the death penalty. And I hold up the form here which is the death penalty form. You will have that in the jury room with you, along with other forms. By this recommendation of sentence form, which I hold in my hand, you, the jury, may recommend that this Court sentence the defendant to death. And I will do so. Please observe that immediately below this part of the recommendation there are twelve lines. Should you decide to recommend the death penalty, this is where each of you would sign your name. It is the law in this State that a recommendation for imposition of the death penalty be a unanimous recommendation and that each and every juror must agree and sign his or her name to the recommendation form.

I will now read to you the text of this form. And it goes on to say, "We, the jury in the above entitled case, having found a reasonable doubt"-- having found -- excuse me. That's wrong. I will start again. "We, the jury in the above entitled case, having found beyond a reasonable doubt the existence of the following statutory aggravating circumstance or

circumstances, to wit: (a blank which you could fill in that aggravating circumstance, if that be your verdict), now recommend to the Court that the defendant, Raymond Patterson, Jr., be sentenced to death." At this point there is a place for you to write the circumstances, as I said, about which I will tell you more later as we get into the discussion.

Again, I want to emphasize in reading the order means absolutely nothing, other than you have got to start one place or the other. I am not in any way giving anything; this is just a form in which it's followed and means nothing.

"now recommend the defendant Raymond Patterson be sentenced to death."

Now I will read next to you the statutory aggravating circumstances, if you find that way.

Now for this recommendation to be made, that is the form I just read, that the defendant be sentenced to death, you must first find that the defendant committed the murder and that the statutory aggravating circumstances existed beyond a reasonable doubt. Now I want to further tell you you have heard evidence in this proceeding of prior convictions and bad acts by the defendant. I tell you that these are not and may not be used as proof of the statutory aggravating circumstances of armed robbery. These may be considered by you only in reference to the character of the defendant and for no other purpose. This information may be considered by you

and given whatever weight, if any, you feel it should have. Do you understand?

I charge you that it is a vital, important rule of the law of evidence that the defendant in a criminal trial, no matter how great or serious may be the offense with which he is charged, must always be presumed to be innocent until his guilt has been proved beyond a reasonable doubt. This presumption remains with the defendant throughout the trial and until the jury has, upon the testimony and the evidence presented, found guilty beyond a reasonable doubt. In this trial it is the solemn duty of you, the jury, if not clearly and unanimously convinced beyond every reasonable doubt that the murder was committed while in the commission of a statutory aggravating circumstance to recommend life imprisonment. As I have stated, the burden of proof is upon the State to prove the guilt of the defendant beyond a reasonable doubt. And it is required that each and every element of the offense or act charged be proved beyond a reasonable doubt. The defendant is entitled to any reasonable doubt. If you have a reasonable doubt as to the guilt of the defendant, he is entitled to that doubt and would be entitled to a sentence of life in prison.

When I use the term, reasonable doubt, I mean by that a sound and sensible doubt, a doubt for which you can give a reason. It is a doubt that leaves the mind of a fair and

impartial juror in a wavering and unsettled condition after he or she has fairly considered all of the testimony and evidence in a case. You, alone, must make the determination of whether or not such a doubt exists in this case.

Now I charge you as to evidence, this part. Well, I will give that a little bit later, on second thought.

Now another jury's verdict was of no consequence to -- now, what another jury's verdict was is of no consequence to you. This is a new case and it is your case. And you don't consider the last case. What another jury did is not to enter into your discussions or deliberations in any manner whatsoever You are here to make your own decision based upon the evidence here before you in this trial and on no other basis. Please remember this because it is very important. The decision in this case is to be yours and yours alone and no one else's.

As I told you earlier, every criminal defendant is presumed to be innocent of all the charges and allegations brought against him. This presumption is like a protective shield which surrounds the defendant and protects him unless and until sufficient evidence is produced to convince you of his guilt beyond a reasonable doubt.

I charge you that the burden of producing sufficient evidence to remove this shield is completely upon the State. A criminal defendant never has the burden of proving that he is innocent.

I am going to charge you about two kinds of evidence, as a basic part of the charge. I now charge you that evidence may be of two kinds, direct or circumstantial. By the term, direct evidence, the law means the testimony of persons who have perceived its existence by means of their senses, as where a person sees a crime committed and comes in to court and testifies as to what he saw. Indirect or circumstantial evidence, on the other hand, means the proof of some other fact or facts from which taken either singly or collectively the existence of the particular fact in question may be inferred as a necessary consequence. Crime may be proved by circumstantial evidence as well as by direct testimony of eye witnesses. Circumstantial evidence is permissible provided it meets the legal test. To the extent that the State relies on circumstantial evidence, it must prove all the circumstances relied on beyond a reasonable doubt. They must be wholly and in every particular perfectly consistent with one another and they must point conclusively, that is to a moral certainty, to the guilt of the accused to the exclusion of every other reasonable hypothesis. In other words, circumstances must be absolutely inconsistent with any other reasonable hypothesis than the guilt of the accused. In the consideration of circumstantial evidence you must seek some other reasonable explanation thereof, other than the guilt of the accused. And if such reasonable explanation can be found, you cannot convict

on such -- and if such reasonable explanation can be found, you cannot convict on such evidence.

What is murder?, next. Well, murder may be defined as the willful and felonious killing of a human being by a human being with malice aforethought, that malice being either expressed or implied. In order to prove a person guilty of murder, the State must not only prove that the deceased was killed by the defendant, but it must also prove beyond a reasonable doubt that the killing was done with malice aforethought. Malice is a word suggesting wickedness, hatred, and a determination to do what one knows to be wrong without just cause, excuse, or legal provocation. What do we mean by aforethought? It means that malice need not be in the mind of the one doing the killing for any particular length of time before the act of killing in order to render the killing murder. If it is present in the mind doing the killing any length of time before the act, then its presence would be sufficient to render the killing murder. Malice is said to be expressed where there is manifested a violent, deliberate intention to unlawfully take away the life of another human being. Malice is implied where one intentionally and deliberately does an unlawful act which he or she then knows to be wrong and in violation of his or her duty to another and where no excuse of legal provocation appears and when the circumstance attending the killing show an abandoned heart, a

malignant heart fatally bent upon mischief. If the evidence should show under the circumstances a shot was fired or a blow delivered which took the life of another, then you, the jury, would have to determine whether under such circumstances the act was malicious. The law says if one intentionally kills another with a deadly weapon the implication of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you along with other evidence in the case and you may give it such weight as you determine it should receive.

In South Carolina a deadly weapon includes any article, instrument, or substance likely to cause death or great bodily harm.

Now, ladies and gentlemen, to repeat, as I told you, in order for you to recommend that this defendant be sentenced to death you must first find the defendant committed this murder and that a statutory aggravating circumstance existed beyond a reasonable doubt.

What is a statutory aggravating circumstance? It is a fact, an incident, a detail or an occurrence which the General Assembly has declared by the Statute could make worse -- has declared by Statute could make worse, that is aggravate, the offense of murder when the two occur together. In other

words, it is something which may increase the enormity or add to the injurious consequences of the offense.

Now, I am going to hold up here what is known as statutory instructions. You see it now in my hand and it will be given to you when you go to your jury room. Upon this sheet of paper I hold in my hand are written the statutory instructions. You have this paper in your jury room, you will have it in your jury room during the deliberations. The body of this form states: "In determing whether to recommend the defendant, Raymond Patterson, to be sentenced by the Court to life imprisonment or to death, you may consider the following statutory aggravating circumstances. One, the murder was committed while in the commission of robbery while armed with a deadly weapon."

I have already told you and you have heard in the evidence of this proceeding of other convictions or bad acts by the defendant. But I tell you again that these are not used as proof of statutory aggravating circumstance of armed robbery. These may be considered only in reference to the character of the defendant and for no other purpose. This information may be considered by you and given whatever weight, if any, you feel it should have. The only one here as to commission is at the time of the murder, if you find murder took place, the armed robbery charge as to only the one instance involved. Let me emphasize to you that these are only circumstances you

may consider as this -- let me emphasize to you that these or this is the only circumstance, one, armed robbery while armed with a deadly weapon, that you may consider as aggravating circumstance. Should you find, and it must be a unanimous finding, that this is a finding by each and every one of you that the State has proven beyond every reasonable doubt the existence of the circumstance listed on this sheet of paper, that is statutory instructions, then you would be authorized which is to day permitted to consider recommending to this Court that the defendnt be sentenced to death. In other words, the State must prove to each and every one of you to your satisfaction and beyond any reasonable doubt that the murder was committed by the defendant while in the commission of armed robbery, while armed with the use of a deadly weapon. That is, while in the commission of the crime.

In order to find the aggravating circumstance listed above, you must find beyond a reasonable doubt that the murder was committed while in the commission of the armed robbery while armed with a deadly weapon. The phrase, while in the commission of, means that the crime was committed, consummated in a continuous series of acts with the murder, that it was committed in the same place and it was not separate and any substantial lapse of time.

I am not going to describe to you what is armed robbery. Robbery is the taking and carrying away of the personal

property of another from his or her person or in his or her presence by violence or by putting that person in fear. Robbery includes larcency, which you would ordinarily call stealing, and all of the elements which are necessary to constitute stealing or larcency are necessary to constitute robbery. In addition, the stealing must have been accomplished by violence or by putting the person having possession of the property in fear. To establish the offense of robbery it is necessary for the State to show: One, that the personal property of another has been taken; two, after being taken, it was carried away; three, the taking and carrying away was with the intent of depriving the owner of it; four, the property was taken from the person of another or in his or her possession; five, the taking was without the consent of the owner; and, six, the taking was accomplished with violence or by putting the person in fear. There is an additional element that the State must prove in this case and that element is that the robbery must have been committed with a deadly weapon. Armed robbery is the felonious taking and carrying away of the personal goods of another from his or her person or in his or her presence by violence or by putting in fear, having and using a deadly weapon to obtain the possession of the property, or putting the person in fear to obtain it. A deadly weapon is a term used in the law just stated to you means any weapon, instrument or object that is capable of being used to inflict great bodily

injury or death.

Please pay particular attention to this. You are never required to recommend the death penalty, even if you find tha the murder was committed while in the commission of armed robbery with the use of a deadly weapon, these being -- this being the statutory aggravating circumstance alleged by the State. In other words, you could still recommend a life sentence, even if you find beyond a reasonable doubt that the statutory aggravating circumstance was present at the time of the murder. I instruct you further that should you find that the State has not proven beyond a reasonable doubt the statutory aggravating circumstance alleged, that is armed robbery with the use of a deadly weapon, then you would not be authorized to recommend the death penalty and your recommendation must be life imprisonment. I would further tell you that, should the State prove beyond a reasonable doubt the existence of a statutory aggravating circumstance which would be sufficient to authorize you to recommend death but the defendant introduces evidence of a mitigating circumstance or circumstances, and you may recommend life imprisonment. I will tell you more about that in a minute. Now, should you find beyond a reasonable doubt that the murder was committed by the defendant and while in the commission of the aggravating circumstance listed on this sheet of paper as statutory instructions, and should you then decide, after fully considering

everything about which I will instruct you in a moment in regard to life imprisonment, that the unanimous recommendation of the jury is to be that the defendant be sentenced to death, then it would be your duty, Madam Forelady -- then it would be your duty, Madam Forelady, to write on the recommendation of sentence form (holding up the form) the statutory aggravating circumstance. That is on the form as to recommendation of death penalty, where you fill in the aggravating circumstance, if that be your finding pursuant to all the instructions I have given you that will follow, which you have found. Then, Madam Forelady, you and each and every jury would sign your name in the place provided. Do you understand? In other words, if the recommendation is for death, then each would have to sign. Not only yourself, but everybody.

Now, life imprisonment. Now we have talked about the death penalty. Now we are going to discuss life imprisonment. And I am going to hold up the form that -- this is the form, recommendation of sentence for life imprisonment. And you will have this form. So you will have three forms in the jury room with you. I tell you first that life imprisonment is to be understood in its ordinary and plain meaning. By this form I hold in my hand you, the jury, can recommend to this Court that the defendant be sentenced to life in prison even if you find the aggravating circumstance beyond a reasonable doubt. I will not read you the text of this recommmendati

form, that is to life imprisonment. It says, "We, the jury in the above entitled case, recommend to the Court that the defendant, Raymond Patterson, Jr., be sentenced to life in prison." And a line for you to sign, Madam Forelady. Please don't, although you must unanimously agree to recommend life imprisonment, only the forelady is required to sign this recommendation form.

I will now instruct you on what you may consider in making your decision as to which sentence to recommend. As I previously instructed, if you find the existence beyond a reasonabl doubt of a statutory aggravating circumstance, then you are permitted, but not required, to recommend the death penalty. There are three conditions which you should consider in reaching your decision. One, first that the defendant was proven by -- first, whether the defendant has proven by any evidence the existence of a statutory mitigating circumstance. Second, whether the defendant has proven by any evidence the existence of any other mitigating circumstances, non statutory. Third, whether for any reason you can think of, or for no reason at all, the defendant should be sentenced to life in prison.

First, I will address the subject of statutory mitigating circumstances. What is statutory mitigating circumstance? It is a fact, an incident, a detail, or an occurrence which the General Assembly has declared by the Statute would reduce

the severity of the offense of murder. In other words, it is a circumstance recognized by the Statute as one which in fairness and mercy may be considered as extenuating or reducin the degree of moral culpability for the commission of the act of murder. A mitigating circumstance is neither justification nor excuse for the murder. It simply lessens the degree of one's moral culpability or tends to make him less blame worthy. What statutory mitigating circumstances should you consider in this case? And I hold up, again, the form initially discussed where we have both aggravating and statutor circumstances listed for your consideration. I refer once again to this sheet of paper entitled Statutory Instructions, so entitled at the top. Immediately below the listing of statutory aggravating circumstances, which I read to you earlier, the text continues. "You may also consider the following statutory mitigating circumstances: One, that the defendant, Raymond Patterson, Jr., has no significant history of prior criminal convictions involving the use of violence against another person. Two, the age of the defendant at the time of the crime." You may also consider any non statutory mitigating circumstance. A non statutory mitigating circumstance is one which is not provided by Statute but is one which the defendant claims serves the same purpose, that is to reduce the degree of his moral culpability of blameworthiness. The mitigating circumstance which I have read, or circumstances

which I have read for your consideration and which you will have in the jury room are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon the defendant You should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstance relating to the case or to the defendant, Raymond Patterson, Jr., as reasons for not imposing the death sentence. In other words, you may in your good judgment impose a life sentence for any reason at all that you see fit to consider or for no reason at all and you need not find a mitigating circumstance at all to impose a life sentence. While there must be some evidence which supports a finding by you that a statuatory or non statutory mitigating circumstance exists, you need not find the existence of such a circumstance beyond a reasonable doubt. In reaching your decision as to whether the sentence to recommend, you will consider the aggravating and mitigating circumstances. While an aggravating circumstance must be found before you can even consider recommending the death penalty, once such a finding is made beyond a reasonable doubt, you may recommend the death sentence even though you find existence of a

mitigating circumstance. In other words, existence of a mitigating circumstance does not keep you from imposing the death penalty. Finally, if you should conclude that a statutory aggravating circumstance exists, you may consider whether the defendant, Raymond Patterson, should be considered to life imprisonment for any reason or for no reason at all. That is what has been referred to as a recommendation of mercy. And should that be your decision, you would indicate by returning to the Court the recommendation of life imprisonment, which I have just shown you the form, which will be signe by you, Madam Foreman or Forelady, alone. In other words, you may choose to recommend life imprisonment, if you find a statutory or non statutory mitigating circumstance, or you may choose to recommend life imprisonment as an act of mercy. In any instance, should you choose to recommend life imprisonment, your decision must be a unanimous one and the forelady alone would be required to sign the recommendation form.

Now I am going to say in summary, again, what I have said.

I will now summarize what I have just told you. You will have in the jury room during the deliberations three forms. One, Recommendation of Life Imprisonment Form; two, Recommendation of Death Penalty Form;
three, Statutory Instructions. The Statutory Instructions state the only aggravating circumstance you shall consider in

this case. Should you fail to unanimously find beyond a reasonable doubt that the murder was committed while in the commission of armed robbery with the use of a deadly weapon, then you would go no further and your recommendation must be for life in prison. Should you unanimously find beyond a reasonable doubt the existence of an aggravating circumstance, you would then be authorized to consider recommending the death penalty. In your deliberations you will consider any statutory or non statutory mitigating circumstances which are supported by the evidence. You will consider the aggravating circumstances you have found against the mitigating circumstances. And you will then decide whether you will recommend the death penalty or recommend life imprisonment. You may also consider any other factors in mitigation or the offense. And you can recommend a sentence of life imprisonment for no reason at all. If you decide to recommend the death penalty, you will complete the proper form, which I've just discussed. You must write out the aggravating circumstances you have found, as I have instructed you. And all twelve jurors must sign the recommendation. Should you decide to recommend life imprisonment, only the forelady must sign the recommendation and no reason is to be given for your decision. Whatever your recommendation is, it must be a unanimous one. That is to say it must be the verdict of each and every juror.

Now in the way of final instructions. In considering

whether to recommend life imprisonment or the death penalty for the defendant, Raymond Patterson, Jr., I charge you that, as jurors, you must decide the issue involved in this proceeding without bias, without prejudice to any party. You cannot allow yourselves to be governed by prejudice, by passion, or by public opinion. Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all the evidence in the case and that you will follow the law, as I have explained it to you.

At this time, ladies and gentlemen, I will ask the alternate juror to stand aside, if all twelve of you are feeling good. All of you look good. Are all of you feeling good? I am going to ask the alternate juror, if she will -- we thank you for service and, if you will, come out here and just have a seat right up here and we will talk to you a little bit later.

Is everybody feeling good? Because nobody can be excused now until the verdict is rendered. Okay.

However, I want say this. The rest of you are going to retire to your jury room. However, do not begin your deliberations until I send word for you to do so. I have some matters to take up with the attorneys and I may have to call you back into the courtroom. You may retire to your jury room, but as I say, do not begin your deliberations at this point in time. Now, you are going to have in your jury room with you all of

NO. 90-968

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

****

STATE OF NORTH CAROLINA,

Petitioner,

v.

LEROY McNEIL,

Respondent.

****

CERTIFICATE OF SERVICE

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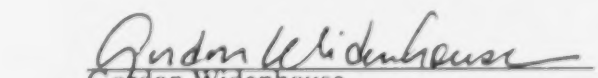
I, Milton Gordon Widenhouse, Jr., a member of the bar of the Supreme Court of North Carolina and a member of the bar of this Court, hereby certify that on the 1st day of March 1991, one copy of the Respondent's Brief in Opposition and Respondent's Request to Proceed *in forma pauperis* in the above entitled case were served upon Mr. Barry S. McNeill, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for the Petitioner therein, by first-class mail, postage prepaid. I further certify that all parties required to be served have been served.

This the 1st day of March, 1991.

Respectfully submitted,



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